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In the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-144

EFRAIN T. SUAREZ, et al.,
Petitioners,

vs.

LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STANLEY JAY BARTEL, ESQUIRE
NORIEGA and BARTEL, P.A.
Attorneys for Petitioners
2100 First Federal Building
One S.E. Third Avenue
Miami, Florida 33131

Bill Shuford, Jr.
Of Counsel on the Petition

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LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

EFRAIN T. SUAREZ and his wife, ZENAIDA SUAREZ, Petitioners, pray that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fifth Circuit, entered April 2, 1975, rehearing denied April 30, 1975, affirming an Order of the United States District Court for the Southern District of Florida, dismissing Counts I, II, III and IV of Petitioners' Amended Complaint for damages and injunctive relief.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported in ____ F.2d ____, and is reprinted as Appendix A hereto, together with a copy of the Order denying rehearing (Appendix C).

JURISDICTION

The Judgment of the Fifth Circuit was entered on April 2, 1975, and a Petition for Rehearing was denied on April 30, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Title 42, United States Code, Section 1984.

PREAMBLE

On June 9, 1975, this Court granted certiorari in *United States v. Janis*, October Term, 1974, Case No. 74-958, to determine whether a transferee agency, the Internal Revenue Service, may use illegally seized evidence, tainted by an illegal local law enforcement search and seizure, in a subsequently filed federal civil tax proceeding.

This case involves the opposite side of that coin, to-wit: the federal civil remedies available to the victim of the illegal local raid, as against the raiding officials and those federal officials waiting in the wings to receive and utilize copies of the illegally seized evidence in the new federal civil tax proceeding.

QUESTIONS PRESENTED

I

WHETHER ATTORNEYS' FEES AND COSTS, INCURRED IN DIRECT EFFORTS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS, ARE RECOVERABLE IN A FEDERAL CIVIL ACTION FOUNDED UPON THE DECISION IN *BIVENS v. SIX UNKNOWN AGENTS*, THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, AND THE INHERENT EQUITABLE POWERS OF THE FEDERAL COURTS?

II

WHETHER 28 U.S.C. §2412 PROVIDES FEDERAL OFFICIALS, ACTING UNCONSTITUTIONALLY, WITH A COMPLETE AND ABSOLUTE IMMUNITY, AS A MATTER OF LAW, FROM ANY CLAIM FOR ATTORNEYS' FEES AND COSTS, AS DAMAGES DIRECTLY SUSTAINED BY THE VICTIM OF AN ILLEGAL INVASION OF FEDERAL CONSTITUTIONAL RIGHTS?

III

WHETHER PRINCIPLES OF FEDERAL OR STATE LAW GOVERN THE QUESTION OF ACCRUAL OF A FEDERAL CIVIL CAUSE OF ACTION UNDER *BIVENS v. SIX UNKNOWN AGENTS* AND THE CIVIL RIGHTS ACTS, AND CONTROL APPLICABILITY OF STATE STATUTES OF LIMITATION?

IV

WHETHER STATE STATUTES OF LIMITATION MAY PROPERLY BE RELIED UPON TO PEREMPTORILY BAR ANY CIVIL RECOVERY AGAINST STATE OFFICIALS IN A FEDERAL ACTION FOUNDED UPON *BIVENS v. SIX UNKNOWN AGENTS* AND THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, WHERE THE UNCONSTITUTIONAL INVASIONS ARE CONTINUING IN NATURE AND WHERE THE DETERMINATION OF UNCONSTITUTIONALITY WAS NOT MADE UNTIL LESS THAN ONE YEAR BEFORE THE FILING OF THE FEDERAL ACTION FOR A CIVIL RECOVERY?

STATEMENT OF THE CASE

In the middle of November of 1963, officials of the City of Miami Police Department and the State Attorney's Office in Dade County, Florida, decided that they would attempt to make a case against the Ayala Clinic for alleged performance of illegal abortions. The state and local officials commenced a thorough investigation, spanning some four to six weeks, prior to the scheduling of a "raid" upon the clinic.

The plan for the raid was painstakingly formulated. It included importing the assistance of two Tampa policewomen, Barbara Williams and Myrtle Ellison, to come to Miami for the operation. In fact, Barbara Williams came to Miami on December 26, 1963, and received detailed instructions [eight (8) days before the raid] from the State Attorney's Office, regarding her role.

As directed, policewoman Williams immediately returned to Tampa and called the Ayala Clinic, pretending to be a woman in need of an abortion. Williams contacted the Clinic on at least two occasions and finally made an appointment for surgery on the morning of January 3, 1964.

The day before the raid, policewoman Williams returned to Miami and executed an affidavit for the State Attorney's Office. Additionally, Williams met with the assistant chief of the Miami Police Department, the commanding officer of the internal security squad of the same department and the State Attorney's special investigator, Michael Daugherty, for a strategy session. A taxicab was rented to carry the Tampa women to the Ayala

Clinic, and a Miami police officer was scheduled to do the driving. Also, policewoman Williams was given $1,000.00 in recorded, marked bills.

Significantly, despite the long investigation and meticulous preparation, utterly no attempt was made by public officers to obtain an arrest warrant for Petitioner, EFRAIN T. SUAREZ (hereinafter referred to as Dr. Suarez), or a search warrant for the Ayala Clinic. Yet, there was somehow time to call for television coverage of the raid.

On January 3, 1964, *following a constitutionally inadequate announcement*, a combined raiding force, consisting of the City of Miami police and personnel from the State Attorney's Office, forcibly entered the Ayala Clinic and arrested Dr. SUAREZ, who was on the premises at the time. During the course of an extensive search, without proper warrant, certain Clinic records were seized by state and municipal officers.

Michael Daugherty took custody of the records, immediately transporting same to his office. Upon arrival at the State Attorney's Office, there was waiting for Daugherty a call from the Internal Revenue Service (hereinafter referred to as I.R.S.), the agency having obviously been apprised of the scheduled raid. As soon as was possible during that same week, Daugherty met with officials of the I.R.S. and *turned over to them a complete set of the illegally seized records.*

Dr. SUAREZ was thereafter tried in State Criminal Court for charges connected with the raid and seizure of documents. He was convicted in January of 1965, despite

pre-trial efforts to obtain suppression of the evidence, and was sentenced to a term in the State Penitentiary.

Dr. SUAREZ then prosecuted an appeal to the Third District Court of Appeal of Florida, which affirmed his conviction in 1966. Subsequently, both the Florida Supreme Court and the United States Supreme Court declined to grant certiorari and review the conviction.

On May 2, 1968, Dr. SUAREZ unsuccessfully endeavored to obtain an original Writ of Habeas Corpus from the Florida Supreme Court. However, once again, he was denied relief. His stays having been exhausted, he surrendered to state officials and began to serve his term of imprisonment.

Next, Dr. SUAREZ engaged the undersigned counsel to seek extraordinary post-conviction relief. This was commenced by first filing a motion under state practice [Rule 1.850 of the Florida Rules of Criminal Procedure] requesting that the state court vacate or set aside the conviction on federal constitutional grounds, it obviously being founded upon an erroneous recognition of tainted evidence. Post-conviction relief was, however, denied by the state trial court. An appeal of the trial court's Order, within the state appellate system, once again was futile, the Third District Court of Appeal of Florida dismissing the cause on March 4, 1969.

On January 31, 1969, having clearly exhausted his state remedies, Dr. SUAREZ filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. There, Petitioner was finally successful in obtaining vindication of his constitutional

rights, the District Court entering, on August 6, 1969, an Order Granting Petition for Writ of Habeas Corpus. (App. F). As of this date, Dr. SUAREZ had served more than a year of his illegal state sentence. Additionally, he had suffered a brutal, unwarranted beating, at the hands of other inmates, while supposedly in the protective custody of state prison officials.

The grounds for the successful federal habeas corpus action were simple. The District Court readily determined that the state and municipal officers, who forcibly broke and entered the premises in question, without warrant, had made a constitutionally inadequate announcement—not stating their identity and purpose—prior to consummation of this long planned raid. The entry having been improper, the search and seizure was thereby irreversibly tainted.

The State of Florida, Respondent in the habeas corpus proceeding, filed lower court motions, seeking to unearth the Order Granting Petition for Writ of Habeas Corpus, but each of its efforts was unsuccessful. No appeal was lodged from the District Court's finding of illegal entry, illegal search and seizure, and consequent violations of the constitutional rights of Dr. SUAREZ, and the determination, in due course, became final, not subject to challenge on any level.

The federal habeas corpus Order granted Florida a reasonable period of time within which to retry Dr. SUAREZ, without, however, relying upon illegally seized evidence. Some six months after the successful habeas corpus action, Dr. SUAREZ not having been retried by the State of Florida, applied, upon substantial notice, for

a ruling from the District Court that a reasonable retrial term had expired. The State of Florida appeared at the hearing designated for this motion and unequivocally announced that it did not intend to retry the doctor, whereupon the District Court entered its Order fixing and determining expiration of the retrial time and finding that a reasonable term had, in fact, expired. (App. G).

While Dr. SUAREZ was engaged in these extensive efforts, first as an accused, then as a convicted defendant and finally as an incarcerated prisoner, to obtain relief from the criminal conviction, the I.R.S. was preparing to assert both a civil tax deficiency and a fraud penalty against the doctor and his wife for the years 1963 and 1964. The initial decision to include a fraud penalty in the claim against Petitioners was eventually reconsidered by the I.R.S., from a tactical standpoint, since the assertion of a fraud penalty in the Tax Court would have placed the burden of proof upon the Commissioner. Thus, in April of 1967 the Commissioner sent a thirty-day letter to Petitioners, claiming a $750,000.00 civil tax deficiency, plus a simple negligence penalty. The negligence penalty would not change the taxpayer's ordinary burden of proof. In response, Petitioners filed a proceeding in the Tax Court of the United States (Docket No. 4196-67) to contest the deficiency.

The Tax Court case was originally calendared for trial in Miami, Florida, in early 1968. However, rather than proceed to trial in defense of the deficiency assessment, the Commissioner of the I.R.S. moved on May 20, 1968, in the Tax Court, that the tax case be continued, *to await the outcome of the post-conviction attacks by Dr.*

SUAREZ upon the search and seizure. It was apparent to all concerned (and the I.R.S. so stipulated) that the Commissioner's leads and evidence had come *solely* from the illegal raid and unconstitutional search and seizure, and, thus, I.R.S. officials concluded that, for their own protection, the hearing upon the civil deficiency claim should be deferred, pending an ultimate court ruling regarding application of the exclusionary rule to the documents and papers illegally seized. In keeping with his wait-and-see attitude, the Commissioner twice again requested and obtained postponement of the Tax Court case, in the Fall of 1968 and the Spring of 1969.

Some thirty (30) days following entry of the habeas corpus Order on August 8, 1969, obviously disturbed by the District Court finding that the evidence in question was tainted by an unlawful search and seizure, federal tax officials completely changed their tactics. No longer content to rely on the determination in the criminal proceeding, they boldly resolved to modify their approach and proceed to seek independent enforcement of the tax deficiency, despite their sole reliance upon tainted evidence and despite the finding of the federal judge in habeas corpus.

By this time, however, Dr. SUAREZ had begun efforts to obtain return of the illegally seized property from state, local and federal officials, by filing a formal motion before the federal District Court Judge on April 24, 1970. Dr. SUAREZ sought to invoke the balance of the jurisdictional power of the federal court in habeas corpus, under 28 U.S.C. §2254, to compel return of the tainted evidence, originals and all copies, as part of the full and complete relief assured by the habeas corpus statute.

By Order on Motion for Return of Illegally Seized Property, the District Court Judge, on May 6, 1970, specifically reserved ruling on the application (indicating, however, favorable reception), so as to allow the Petitioner, under comity principles, to initially apply to the state criminal court for entry of an appropriate order as to the suppressed evidence. Moreover, in the state court system, a specific statutory provision was applicable, setting forth the procedure for return of illegally seized property. FLA. STAT. §933.14.

The state Criminal Court of Record, on May 22, 1970, duly entered an Order directing the return of the property seized. Said Order provided as follows:

> ORDERED and ADJUDGED that the State of Florida, its attorneys, investigators, agents, agencies, and representatives, and any persons in privity with any of them, be and they shall forthwith return to the within Defendant, EFRAIN T. SUAREZ, through his counsel of record herein, Stanley J. Bartel, Esquire, 341 Pan American Bank Building, Miami, Florida, all books, records, papers, documents and other items seized, and any and all copies of the same, excluding only photographs made during or after said raid.

(App. H).

On that same day, after a tracing of the property disclosed the state's January 1963 turnover to federal tax investigators, a formal demand was made upon the I.R.S. for return of all portions of the evidence held to have been illegally seized. (App. I). Despite Dr. SUAREZ's

constitutional entitlement to be returned to *status quo ante* as to all property taken, in further violation of the rights of Petitioners, the I.R.S. stubbornly refused to comply with the court Order of May 22, 1970, as well as the doctor's own formal demand for return of the evidence. Instead, the I.R.S. obstinately responded by serving a retaliatory subpoena upon counsel for Dr. SURAEZ, directing production before the Tax Court of the originals of the same documents illegally seized by state and local officers.

Federal officials having obstinately refused to return the illegally obtained property, on June 5, 1970, the State Criminal Court of Record Judge directed to the federal officials an Order to Show Cause why they should not be held in contempt of court. (App. J). However, in keeping with their firm resolution to retain the property of the doctor, at all costs, federal officials declined to respond to the Order to Show Cause and, rather, removed the entire state criminal case, pursuant to 28 U.S.C. §1442, to the federal District Court on June 9, 1970, effectively staying all further proceedings in the state criminal case. (App. K).

Dr. SUAREZ, faced with an unrelenting insistence by the I.R.S. upon use of tainted evidence, initiated a two-pronged attack in the federal District Court of the Southern District of Florida. The doctor once again requested that the federal District Judge act upon his earlier motion for return of the illegally seized property and grant full relief under 28 U.S.C. §2254, by enjoining illegal use of the tainted evidence and directing immediate return of same. Simultaneously, Dr. SUAREZ and his wife filed a new civil suit in federal court, founded upon the Fourth and Fifth Amendments of the United States Constitution

on one hand and the federal Civil Rights Act on the other, seeking injunctive relief of the same nature and, in addition, seeking a recovery of civil damages. (App. D). [Jurisdiction of the federal District Court was invoked under 28 U.S.C. §§1331, 1340, 1343, 1346, 1357.]

The District Court, in a simultaneous hearing of both the habeas cause and the civil suit, initially granted a temporary injunction, indicating, quite explicitly, its reasons, as follows:

> ... I am going to grant the motion for a temporary injunction as ancillary in order to enforce my habeas corpus order, and I am going to rule that, in addition thereto, in an action of this sort, although it is civil in nature, it essentially partakes of at least the forefeiture provision in that it seeks to attempt to collect a penalty, and it is also quasi-criminal in that it might conceivably lead to a criminal prosecution and, therefore, both the Fourth and Fifth Amendments are involved.
>
> I will rule that the use of any evidence obtained in this illegal search and seizure or any leads or other materials obtained therefrom are enjoined in that they violate the plaintiff-petitioner's constitutional rights.
>
> • • •
>
> GOVERNMENT COUNSEL: And may I ask you, you are restraining the tax court from proceeding?
>
> THE COURT: No, sir, I am not restraining the tax court at all. I am ruling that the evidence

> was unconstitutionally and illegally received. And I am holding that it is illegal for any person to use that evidence or any leads obtained from it in any criminal or civil proceeding of any nature so far as this particular person is concerned. . . .

At this juncture, the District Court having indicated its position, government counsel pointed out that the government had not been given an opportunity to present formal motions to dismiss the civil action and to argue jurisdiction. The District Court, in proper response, indicated that Dr. SUAREZ would be granted a temporary injunction, but that the government would be immediately heard on a motion to vacate and upon motions contesting jurisdiction.

Within a few days, the District Court held a hearing upon defense motions to dismiss the civil complaint of Petitioners, and, once again, considered the propriety of injunctive relief. At the conclusion of this second hearing, the District Court surprisingly reversed its position, vacating its prior rulings and dismissing Counts I, II, III and IV of Petitioners' Amended Complaint, stating it would grant no injunctive relief so long as the Tax Court was willing to hear the deficiency case. (App. E).

At this stage of the within discussion, it should be pointed out that all three of the pending federal actions —habeas corpus, the removed state criminal proceeding, and the civil claim for injunctive relief and damages— were consolidated (Order of Consolidation of July 8, 1971) and, yet, the District Court declined, under each and every theory presented, to direct return of the evidence adjudged to have been illegally seized. This was so, notwithstanding that the federal officials were in clear privity with the state officials as to the illegally seized evidence and, further, notwithstanding the stipulation of record, by federal officials, that the *sole source* for their tax deficiency was the very evidence held by the court, in the criminal proceeding, to have been illegally seized.

Thus, Petitioners prosecuted an appeal to the Fifth Circuit Court of Appeals, asserting the trial court erred in dismissing the Amended Complaint and declining to enjoin use of the tainted evidence by I.R.S. officials.

While the Fifth Circuit appeal was pending, the Tax Court considered pretrial motions, filed by Dr. SUAREZ and his wife, to suppress use of the tainted evidence in the Tax Court. Significantly, the Tax Court ruled on Auguest 10, 1972, in an opinion totally consistent with the findings of the federal court in the habeas corpus action, that the evidence in question was is fact tainted and was, thus, inadmissible, as the product of an unconstitutional search and seizure. For the convenience of this Court, a copy of the 1972 Tax Court opinion has been reproduced in Appendix II, as App. M. In keeping with the 1972 opinion, the Tax Court entered its pretrial Order of August 16, 1972, suppressing the illegally seized evidence. This Order is also reproduced in Appendix II hereto, as App. N.

It appearing that the Commissioner of the I.R.S. had utterly no evidence in support of the deficiency assessment, save tainted forms, the Tax Court entered a final Order on March 26, 1974, finding in favor of Petitioners in their challenge of the deficiency assessment and civil penalty.

A copy of the March 26, 1974, final decision of the Tax Court is reproduced in Appendix II, for the convenience of the Court, as App. O.

The Commissioner thereupon prosecuted an appeal from the Tax Court to the Fifth Circuit Court of Appeals (Case No. 74-2663). However, it became apparent to the I.R.S. that, in light of recent cases in the Seventh and Ninth Circuits, ruling that tainted evidence may not be used in a civil tax proceeding, the agency had no meritorious appeal in a cause involving exclusively tainted evidence. Having carefully considered the decisions in *Janis v. United States* [Case No. 73-226 (9th Cir. 1973)] and *Romanelli v. Commissioner* [466 F.2d 872 (7th Cir. 1972)], the Commissioner elected to proceed no further with the agency's appeal. Thus, on December 2, 1974, the Fifth Circuit dismissed the appeal of the Tax Court decision, rendering final the Tax Court determination. Thus, as insisted by Petitioners all along, the transferee federal officials, the I.R.S., could not utilize the fruits of an illegal search and seizure as the sole basis for a civil tax proceeding.

The ruling of the Tax Court, once finalized by dismissal of the Commissioner's appeal, effectively rendered moot those points in the Fifth Circuit Brief of Petitioners, directed to the issues of privity [whether transferees are bound by the adjudication of illegality in the criminal proceeding] and entitlement to injunctive relief [where all of the evidence is tainted]. (App. A). Nevertheless, when the Fifth Circuit appeal was finally scheduled for argument and resolution, the matter of dismissal of the Amended Complaint of Petitioners, for recovery of damages incurred

in vindication of constitutional rights, remained before the court for determination.

To further clarify the issues before the Fifth Circuit, it should be pointed out that Count V of Petitioners' Amended Complaint [involving the prison beating of Dr. SUAREZ] had been amicably settled. Additionally, it is pertinent that Count IV of the Amended Complaint (claim for false imprisonment) has been abandoned by Petitioners. Thus, the appeal below centered upon Counts II and III of the Amended Complaint, which set forth causes of action against federal, state and local officials under the federal Civil Rights Acts, *Bivens v. Six Unknown Agents*, and the equitable jurisdiction of the federal courts, for violations of constitutional rights.

Despite the complex course of events reflected within this detailed statement of the case (necessary to a complete understanding of the continuing abuses Petitioners have been caused to suffer *for some eleven (11) years*), the Fifth Circuit has concluded, as did the trial court, that federal law affords absolutely no civil remedy to Petitioners, so as to truly return them to the *status quo ante*, following the illegal raid.

The decision under scrutiny here was founded upon three simple grounds:

A. Civil damages, in the form of attorneys' fees and costs, as incurred in direct efforts to vindicate constitutional rights, are not recoverable against public officers under the federal Civil Rights Acts, the cause of action established in *Bivens v. Six Unknown Agents*, and the equitable powers of the federal courts. (App. A).

B. Federal officers are immunized from an award of civil damages by 28 U.S.C. §2412, despite the federal Civil Rights Acts, *Bivens v. Six Unknown Agents*, and the equitable powers of the federal courts. (App. A).

C. State statutes of limitation may be relied upon by the federal District Court to deny a claimant recovery against state officials, in a federal civil action founded upon *Bivens v. Six Unknown Agents*, the federal Civil Rights Acts, and the equitable jurisdiction of the federal courts. (App. A).

The conclusion and decision of the Fifth Circuit, on the points presented, is in direct conflict with the decisions and holdings of this Court and other Courts of Appeal in this country, which permit a recovery of attorneys' fees and costs, as damages, under the theories properly pled within the Amended Complaint of Petitioners, state statutes of limitation and immunity principles notwithstanding. Thus, important questions of federal law have been framed for this Court's examination.

REASONS FOR GRANTING THE WRIT

I

ATTORNEYS' FEES AND COSTS, INCURRED IN DIRECT EFFORTS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS, ARE RECOVERABLE IN A FEDERAL CIVIL ACTION FOUNDED UPON THE DECISION IN *BIVENS V. SIX UNKNOWN AGENTS*, THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, AND THE INHERENT EQUITABLE POWERS OF THE FEDERAL COURTS.

The United States Constitution holds inviolate that fundamental right of all citizens of this country to be secure in their persons and property against unreasonable and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. When federal officials invade this basic, primary right by conducting an unlawful and unreasonable search and seizure, and engaging in acts which are in complete derrogation of one's entitlement to privacy, federal common law provides the violated citizen with a mechanism for redress of his injuries, a civil cause

of action for damages. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

Similarly, federal statutory law has made provision for civil recovery of damages against public officers, who, acting under color of law, violate the Fourth Amendment right of a citizen:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1938. While 42 U.S.C. § 1983, the most noted provision of the Civil Rights Acts, deals basically with "deprivation" of constitutional rights, it is important to note, in light of the Amended Complaint of Petitioners, that conspiracies aimed at infringement upon constitutional rights will also give rise to a civil claim. 42 U.S.C. § 1985. (App. L).

Despite the quite liberal provisions of federal law, above presented, permitting recovery of money damages from public officials who violate the constitutional rights of citizens, the Fifth Circuit Court of Appeals has concluded, in the instant cause, that there is "no basis on which attorneys' fees could be allowed in this kind of action" against state, local and federal officials. Thus, in

affirming the District Court's dismissal of Petitioners' Amended Complaint, the Fifth Circuit has ruled that costs and attorneys' fees incurred in direct efforts to vindicate constitutional rights may not be awarded under *Bivens v. Six Unknown Agents*, the Civil Rights Acts, and even the equitable jurisdiction of the federal courts. While this Supreme Court has not previously had occasion to treat this question, the ruling of the Fifth Circuit stands out, among the many federal decisions on the issue, as one in bold conflict with what appears to be the prevailing trend.

Initially, it should be pointed out that federal courts called upon to construe the remedial provisions of the Civil Rights Acts have uniformly held that award of attorneys' fees and costs in favor of one who has been deprived of civil rights is proper and, in fact, ordinary, "unless special circumstances would render such an award unjust." *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D. N.C. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Gilpin v. Kansas State High School Activities Assn.*, 377 F.Supp. 1233 (D. Kan. 1974). Importantly, federal courts have decided that where a significant public interest is involved, award of attorneys' fees and costs is necessary to render the remedy under the Civil Rights Acts "effective." *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). If a trial court declines to award attorneys' fees in a civil rights action, it has been held that there must be "an affirmative, articulated reason for the denial." *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973).

Award of attorneys' fees in a civil rights case, or a *Bivens* type cause, is frequently viewed as a prerequisite to return of the damaged citizen to the status quo. Where

a party has been subjected to unnecessary, costly, time consuming and protracted litigation, in order to vindicate fundamental and well established rights, recent cases permit recovery of attorneys' fees, in order that one might be made whole. The aim is to "shift the financial burden" to the shoulders of the government officials, upon which it properly belongs. *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973); *First National Bank v. Dunham*, 471 F.2d 712 (8th Cir. 1973); *Monroe v. Board of Commissioners of Jackson*, 453 F.2d 259 (6th Cir. 1972); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974).

Often, appellate courts ground an award of attorneys' fees on public policy. According to the Third Circuit Court of Appeals, "withholding an award of attorneys' fees in a case where a constitutional violation has been established removes a substantial incentive toward efforts looking to vindicate constitutional rights." *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 44 (3d Cir. 1974). Thus, attorneys' fees and costs are permitted not only to make the client whole, but to encourage direct efforts to enforce and protect constitutional rights. *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Council of Organizations on Philadelphia Police Accountability & Responsibility v. Tate*, 60 F.R.D. 615 (E.D. Pa. 1973).

Perhaps, the Second Circuit Court of Appeals has most eloquently set forth the primary justification for award of attorneys' fees and costs as incurred in efforts to vindicate constitutional rights:

> Rather, the objective is to assure that the plaintiff, and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants.
>
> * * *
>
> When, as here, the constitutional right is one of great importance and proof of an intentional and serious violation is clear and definite, enforcement should not be inhibited by reason of litigation costs.

Stolberg v. Members of the Board of Trustees for the State Colleges of Connecticut, 474 F.2d 485 (2d Cir. 1973); *accord*, *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974).

Where the entire class of citizens has benefited from an effort to vindicate fundamental rights, it would be unjust to cause a crusader to suffer the entire expense of his noble efforts. *Counsel of Organizations on Philadelphia Police Accountability & Responsibility v. Tate*, 60 F.R.D. 615 (E.D. Pa. 1973).

Significantly, an award of attorneys' fees and costs has been held to be particularly appropriate under *Bivens*, the Civil Rights Acts and the equitable jurisdiction of the federal courts, where extensive and protracted litigation has been required, as in the instant cause, to *vindicate one's constitutional right to be free from illegal searches and seizures. Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973); *Lykken v. Vavreck*, 366 F.Supp. 585 (D. Minn. 1973); *McArthur v. Pennington*, 253 F.Supp.

420 (E.D. Tenn. 1963); *United States. v. Koelzer*, 457 F.2d 892 (3d Cir. 1972). The language of the Fourth Amendment decisions is uniform:

> While various rationales have been given for including attorneys' fees as costs, the courts are in essence making a judgment that including attorneys' fees as costs is an additional remedy necessary to effectuate the Congressional underpinnings of a substantial program.
>
> * * *
>
> The Court in *Bivens* held that in order to protect encroachment by federal officers on rights protected by the Fourth Amendment, it was necessary to imply a particular remedial mechanism, that is, suits for damages.
>
> * * *
>
> "These [Fourth Amendment rights], I protest, are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cow ing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."
>
> * * *
>
> Where as here fee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorneys' fees as costs is essential, lest these important rights be relegated to a mere platitude.

Stanford Daily v. Zurcher, 366 F.Supp. 18, 24-25 (N.D. Cal. 1973).

Also, federal courts have held that attorneys' fees and costs are especially merited in those cases wherein the public officers complained of have acted in bad faith, vexatiously, w a n t o n l y, unreasonably, obstinately, and oppressively. *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D. N.C. 1974); *Diamond Shamrock Corp. v. Lumbermen's Mutual Casualty Co.*, 466 F.2d 722 (7th Cir. 1972); *Gilpin v. Kansas State High School Activities Assn., Inc.*, 377 F.Supp. 1233 (D. Kans. 1974); *Monroe v. Board of Commissioners of the City of Jackson*, 453 F.2d 259 (6th Cir. 1972); *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974). And, it should be pointed out that such bad faith, unreasonableness, obstinacy, and obdurateness may be reflected within not only the initial invasion of a constitutional right, and immediate turnover of tainted evidence to federal officials as well, but *in the subsequent co duct of the litigation, with full knowledge of infringement of constitutional rights*, as is immediately noted with regard to the I.R.S. in this cause. *Hall v. Cole*, 93 S.Ct. 1943 (1973).

Clearly, in light of the foregoing principles of law, the official conduct under scrutiny in this case not only merits, but would compel, an affirmative award of attorney's fees and costs to Petitioners, assuming the factual allegations of the Complaint are proven, as the trial court must on hearing a motion to dismiss. The key points of the cause of Petitioners against federal, state and local officials, are as follows:

A. On January 3, 1964, Petitioner, EFRAIN T. SUAREZ, was subjected to an illegal entry, search and seizure, conducted by the State Attorney's Office in Dade County, Florida, and the City of Miami Police Department.

B. State and local officials were fully apprised of proper procedures for obtaining warrants and securing access to private property, but in bold disregard of the rights of Petitioner, EFRAIN T. SUAREZ, declined to follow proper, established procedures and conducted a warrantless raid with an illegal entry.

C. State and local public officers immediately delivered copies of the illegally seized evidence to federal officials, who were aware, at all times, of the circumstances surrounding the illegal raid, search and seizure.

D. Federal officials proceeded to assert a tax deficiency against Petitioners, with full knowledge that the sole basis for same was the illegally seized evidence. They waited, they hoped, for a holding of legality in the post-conviction proceedings, but then, when illegality was found, they reversed their field.

E. Federal officials then boldly flouted state court orders requiring return of the tainted documents, further infringing upon the constitutional rights of Petitioners.

F. Despite a federal court determination that the evidence in question was improperly seized, and a concession that it was the sole basis for the deficiency assessment, federal officials continued to utilize same in the Tax Court. Federal officials also strenuously and obstinately imposed further on Petitioners by refusing to litigate the

privity question, as a pure question of law in the action below, and instead insisted on a trial *de novo* of the search and seizure, including the facts surrounding the raid, in the Tax Court. Then, when the Tax Court concluded the case, no new evidence had been adduced by the federal officials. Only thousands of dollars more in costs and fees had been inflicted on Petitioners.

G. At no time did state or local officials take any action to retrieve the tainted evidence they delivered to third parties, rendering the invasion upon the rights of Petitioners one continuing in nature.

H. Eventually, the Tax Court determined that the evidence in question was illegally seized [a matter which should have been readily held *res judicata*] and that it had been improperly relied upon by the I.R.S. to assert a tax deficiency.

I All public officials knowingly violated the constitutional rights of Petitioners.

J. All officials in question continually conspired to deny Petitioners their constitutional rights.

While Petitioners have set forth herein a summary of the factual and procedural allegations supporting their cause, they would emphasize that the Amended Complaint contains abundant allegations of fact to require treating them as true for purposes of this case. Petitioners sought, on the trial level, not momentous general damages, but merely a civil recovery of substantial attorneys' fees and costs, incurred in an eleven-year effort to vindicate constitutional rights. There being clear legal bases for recovery of attorneys' fees and costs, the Fifth Circuit Court of

Appeals erred in affirming the dismissal of the Amended Complaint. *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971). The Fifth Circuit having ruled that there can be no cause of action for attorneys' fees and costs under *Bivens*, the Civil Rights Acts, and the common law jurisdiction of the federal courts, an important question of federal constitutional, statutory and case law has been framed for consideration by this Court.

II.

CLEARLY, 28 U.S.C. §2412 DOES NOT PROVIDE FEDERAL OFFICIALS, ACTING UNCONSTITUTIONALLY, WITH A COMPLETE AND ABSOLUTE IMMUNITY, AS A MATTER OF LAW, FROM ANY CLAIM FOR ATTORNEYS' FEES AND COSTS, AS DAMAGES DIRECTLY SUSTAINED BY THE VICTIM OF AN ILLEGAL INVASION OF FEDERAL CONSTITUTIONAL RIGHTS.

According to controlling precedent of this Supreme Court and other federal appellate courts, neither federal, nor state and local public officers have an absolute immunity from suit for an illegal arrest or an unreasonable search and seizure. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974); *Wood v. Strickland*, 43 U.S.L.W. 4294 (U.S. Supr. Ct. Feb. 25, 1975); *Bivens v. Six Unknown Agents*, 403 U.S. 338, 91 S.Ct. 1999 (1971); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Butler v. United States*, 365 F.Supp. 1035 (D. Hawaii 1973); *Tritsis v. Backer*, 355 F.Supp. 225 (N.D. Ill. 1973).

The foundation for denial to public officials of the immunity shield, in a civil action founded upon invasion of Fourth Amendment rights, has been held to be "the superior authority" of the Constitution. When a state or federal officer acts, under color of law, in a manner violative of the federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974); *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

In affirming the trial judge's dismissal of the Amended Complaint of Petitioners, the Fifth Circuit below ruled that the "federal defendants are immunized from an award of attorneys' fees by provisions of 28 U.S.C. §2412":

§2412. Costs.

Except as otherwise specifically provided by Statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be

> as provided in §2414 and §2517 of this title for the payment of judgments against the United States.

(App.A). Boldly disregarding well established precedent in *Bivens* and civil rights actions, as above set forth, the Fifth Circuit relies upon a single previous decision of its own, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department* to apply 28 U.S.C. §2412 to the instant cause. 496 F.2d 1017 (5th Cir. 1974).

Significantly, as the Fifth Circuit pointed out, in *San Antonio*, all parties "conceded" that federal officers were immunized from an award of attorneys' fees by the provisions of 28 U.S.C. §2412. In the instant cause, there was never such an admission or stipulation by the parties to the Fifth Circuit appeal.

Further, an examination of 28 U.S.C. §2412 and legislative history immediately reveals that its purpose was and is not to immunize federal officers from civil recoveries of attorneys fees for conduct violative of constitutional rights. Rather, it was Congress's intent and purpose, in enacting 28 U.S.C. §2412, merely to "correct the disparity" between private litigants and the United States in terms of award of costs and to provide for "uniformity of treatment in the award of costs." *United States v. 12.85 Acres of Land*, 312 F.Supp. 651 (E.D. Tenn. 1971); U.S. Code Congressional and Administrative News, pp. 2528-29 (1966).

The Fifth Circuit's decision in this case, extending 28 U.S.C. §2412 to a *Bivens* cause and an action founded upon the Civil Rights Acts, contravenes legislative intent

and serves to defeat totally the judicial purpose for award of attorneys' fees, as expressed in Reason I, encouragement of actions by citizens to vindicate invasions by public officers upon constitutional rights.

While a narrow construction of 28 U.S.C. §2412, based upon legislative intent, might render unnecessary a constitutional attack upon said statutory provision, Petitioners would respectfully take the position that the Act is unconstitutional, if it in fact serves to prohibit a recovery of attorneys' fees in a suit based upon *Bivens* or the Civil Rights Acts. This Court having determined that "the superior authority" of the Constitution preempts any immunity in favor of public officials, where constitutional rights have been violated, 28 U.S.C. §2412, to the extent the Fifth Circuit construes same to create an immunity, must be found to be unconstitutional upon the same principle of superior authority of the Constitution. Surely, this Court does not and cannot sanction legislative attempts to subvert constitutional rights, by immunizing federal officials from liability for damages, in the form of attorneys' fees, incurred by citizens who have been subjected to unconstitutional invasions.

Finally, petitioners would point out that two qualifications within 28 U.S.C. §2412 properly apply to the instant case, rendering the Act inapplicable. First of all, the initial clause of the section — "except as otherwise specifically provided by statute"— may properly be construed to render §2412 preempted by 42 U.S.C. §1983, the "damages" term in the Civil Rights Act being uniformly construed to properly permit recovery of attorneys' fees and costs.

Secondly, the "immunity provisions", if any, of 28 U.S.C. §2412 are stated to be applicable only to an agency or official "acting in his official capacity". Significantly, a public official is deemed, under the cases presented within this question and the previous question, to have exceeded proper authority, or to have arbitrarily and grossly abused powers, thus stripping himself of any immunity, where such officer has been engaged in an unconstitutional invasion of civil rights. Consequently, under the "official capacity" language of §2412, the statute should be held inapplicable to a cause founded on *Bivens v. Six Unknown Agents* and the Civil Rights Acts. The law mandates that an official engaged in infringement of constitutional rights of others be treated as any mere lawbreaker, removing the shield of any immunity, and, thus, 28 U.S.C. §2412 can afford no absolute protection.

The Fifth Circuit's strained interpretation of 28 U.S.C. §2412 stands to have a tremendous impact upon federal civil actions for recovery of damages under *Bivens* and the Civil Rights Acts. Broad and hasty application of the Act, to immunize federal officials from civil recovery of attorneys' fees, clearly stands to have a chilling effect upon efforts by citizens to seek vindication of federal constitutional rights. Therefore, a significant federal statutory and constitutional issue appears open for this Court's examination and resolution.

III

PRINCIPLES OF FEDERAL LAW, AS OPPOSED TO STATE LAW, GOVERN THE QUESTION OF ACCRUAL OF A FEDERAL CIVIL CAUSE OF ACTION UNDER *BIVENS v. SIX UNKNOWN AGENTS* AND THE FEDERAL CIVIL RIGHTS ACTS, AND CONTROL APPLICABILITY OF STATE STATUTES OF LIMITATION.

As a general proposition, an action created by federal law, whether statutory or common law, is properly governed by federal, not state, substantive principles. *Lauderdale v. Smith*, 186 F.Supp. 958 (E.D. Ark. 1960). Significantly, this important concept has been specifically held to be applicable to actions aimed at "vindication of federal civil rights guaranteed by the Constitution." *Martin v. Duffie*, 463 F.2d 464 (10th Cir. 1972); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961).

In the instant cause, the Fifth Circuit, in a bald statement of holding, affirmed at trial court application (via dismissal of the Amended Complaint) of a three year Florida limitation period to bar assertion of a civil rights action against state and local officers under *Bivens v. Six Unknown Agents* and the Civil Rights Acts:

> He claimed against the state officials as well, but it is clear that any claim against them ... would be barred by the Statute of Limitations.

(App. A). See FLA. STAT. §95.11. The Fifth Circuit declined completely to set forth its rationale and the legal bases, if any, for its conclusion.

Initially, it should be pointed out, therefore, that there are no legislated limitations, federal or state, applicable to federal civil actions prosecuted under *Bivens* and the Civil Rights Acts. Consequently, according to prevailing federal law, rather than boldly deferring to a very general state limitation provision, the federal courts must "fashion the governing rule" according to "their own standards", being primarily concerned with "divining and effectuating" federal policies. 1 J. MOORE, FEDERAL PRACTICE, ¶0.322-0.328; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573 (1943); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961). While federal courts may look to state statutory and case law for guidance, it must be emphasized that state law may not be relied upon to fill the interstices where it serves to defeat federal policies, by effectively and uniformly destroying a federal cause of action, normally vigorously encouraged by the federal court system. *Id.*

The primary interest of the federal court must be to preserve the federal cause of action and the term of a state statute of limitation is only one *factor* to be considered in deciding when a right to seek civil relief for violations of constitutional protections begins and terminates.

Thus, in determining when the clock starts to run for the purpose of applying a "borrowed statute of limitation" or a common law limitation to a federally created remedy, federal, not state, law is controlling. *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967); *Kramer v. Loewi & Co., Inc.*, 357 F.Supp. 83 (E.D. Wis. 1973). Having set forth the applicable principle in one of its prior cases, *Azalea Meats*,

the Fifth Circuit elected, however, to ignore same in the instant case and quite apparently proceeded to start the limitation clock running, as regards state officials, from the time of the illegal entry and unlawful search and seizure, January 3, 1964, choosing to disregard completely federal policy, governing *Bivens* and civil rights actions, and federal principles of law regarding accrual of a cause of action.

Clearly, in civil rights cases, federal courts should use that combination of federal law, common law and state law as will be best adapted to the object of the civil rights laws, and must use common law powers to facilitate, and not to hinder, proceedings undertaken to vindicate civil rights. The Fifth Circuit relied solely upon a Florida statute of limitation to bar the claim of Petitioners, boldly declining to consider other highly relevant factors—the continuing nature of the invasion upon constitutional rights, the fact that the damages of Petitioners could not be accurately ascertained until the search and seizure in question was finally adjudged to be unlawful and until the invasions upon privacy ceased, and the policy of this Court that *Bivens* and civil rights type actions be vigorously pursued for the ultimate benefit of all citizens in this country.

Summary application of the state limitation provision, in disregard of federal policy and federal substantive principles, to deny Petitioners a forum for civil recovery of damages incurred in vindication of constitutional rights, presents itself as an important question for consideration by this Court.

IV

STATE STATUTES OF LIMITATION MAY NOT PROPERLY BE RELIED UPON TO PEREMPTORILY BAR ANY CIVIL RECOVERY AGAINST STATE OFFICIALS IN A FEDERAL ACTION FOUNDED UPON *BIVENS v. SIX UNKNOWN AGENTS* AND THE REMEDIAL PROVISIONS OF THE FEDERAL CIVIL RIGHTS ACTS, WHERE THE UNCONSTITUTIONAL INVASIONS ARE CONTINUING IN NATURE AND WHERE THE DETERMINATION OF UNCONSTITUTIONALITY WAS NOT MADE UNTIL LESS THAN ONE YEAR BEFORE THE FILING OF THE FEDERAL ACTION FOR A CIVIL RECOVERY.

Where a civil cause of action is founded upon a search and seizure, which is being challenged in state and federal criminal and habeas corpus proceedings, the cause does not properly ripen or accrue until there is a final determination that the search and seizure was unlawful and unreasonable. Unless it is established that the search and seizure under attack was illegal, clearly, no violation of constitutional rights, such as will give rise to a civil suit under *Bivens* or the Civil Rights Acts, can be found to exist.

It seems axiomatic, so as not to require citations, that awareness of an injury is a prerequisite to accrual of a cause of action under the federal statutory and constitutional provisions herein question, which permit recovery of damages for violations by public officers of Fourth Amendment rights. Such an awareness does not arise, in

a search and seizure case, until the conduct complained of is ultimately found to be in derrogation, as a matter of law, of constitutional guidelines.

In the instant case, Petitioner, EFRAIN T. SUAREZ, was the subject of an illegal and unreasonable search and seizure on January 3, 1964. However, the raid by state and local public officials, which included an extensive search and seizure of the personal property of said Petitioner, was not adjudicated to have been wrongful until August 8, 1969, when a Federal Judge entered an Order upon Petition for Habeas Corpus, directing release of Petitioner, EFRAIN T. SUAREZ. On June 3, 1970, within one year of the habeas Order, Dr. SUAREZ and his wife filed their civil action.

As has been previously pointed out, the action of Petitioners was dismissed, with prejudice, shortly after filing, the trial court finding a three year Florida statute of limitation to bar the suit, as against state officials. The Fifth Circuit affirmed in the decision below, without setting out the grounds for its judgment. (App. A).*

In affirming, it is clear, however, that the Fifth Circuit has rejected entirely the position of Petitioners as expressed in the opening paragraph of this presentation. Petitioners would respectfully submit the position taken

*(As regards federal officials, the Fifth Circuit properly found no limitations issue, for the conduct complained about, including overt acts, was clearly ongoing at the time of the filing of the federal civil action by Petitioners. This fact is immediately apparent from examination of the posture of the Amended Complaint of Petitioners, the primary relief sought by them in Count I being injunctive—entry of an order to restrain ongoing violations of constitutional rights, more specifically, utilization of tainted evidence in violation of the silver platter doctrine.)

by the Fifth Circuit is incorrect, for the court has neglected to properly consider the totality of the factual circumstances supporting Petitioners' claim, which must be accepted as true, and has neglected to give due credence to federal policy, which encourages actions to vindicate constitutional rights.

Until entry of the federal habeas corpus order of August 8, 1969, there was no "cause of action" or claim that could be made against city and state officials for attorneys' fees and costs on account of the unconstitutional search and seizure. Absent a final adjudication of wrongfulness, binding upon the opposing party, it would be premature to seek damages for a violation of Fourth Amendment rights. As a matter of fact, had Petitioner filed this claim before the August 8, 1969, Order, certainly the accused officials would have relied upon the numerous state trial and appellate court decisions and judgments finding the raid, search and seizure to be lawful, in order to defeat the position of Petitioners, thus prejudicing their claim.

An analogy might, at this point, be drawn between actions for violation of constitutional rights and suits for wrongful injunctions. In the latter, until there is a final determination that an injunction wrongfully issued, the right of a defendant to recover civil damages, costs and attorney's fees for the infringement upon his freedoms, does not accrue. *Roger Dean Chevrolet, Inc. v. Painters, Decorators & Paperhangers of America*, 155 So.2d 422 (3d D.C.A. Fla. 1963). It seems equally clear, in the absence of a distinguishing feature which would merit a different rule, that the cause of action for violation of Fourth

Amendment rights comes into existence only upon final determination by the court that a search and seizure was unreasonable.

Nevertheless, an additional, independent ground appears for a finding that the cause of action of Petitioners was timely filed, within any state or common law limitation. Where the infringement upon constitutional rights is "continuing" in nature, statutes of limitation do not begin to run at the point of initial violation, but are properly measured from the date of termination of the invasion about which there is duly asserted a civil complaint. *Pennsylvania v. Glickman*, 370 F.Supp. 724 (W.D. Pa. 1974). The justification for this rule in Fourth Amendment cases is twofold. At the time of the initial wrong, damages are not "immediately ascertainable", but are speculative. Many years may pass before a final vindication of rights is realized in the federal courts, and the full extent of damages, specifically, attorneys' fees, expenses and costs, will not be known until that ultimate vindication. Secondly, if the invasion of rights involves property and the Fourth Amendment, the infringement does not and cannot cease until the invasion of privacy terminates with a return of the property to the injured party. See *Railing v. United Mine Workers of America*, 445 F.2d 353 (4th Cir. 1971); *Contract Buyers League v. F & F Investments*, 300 F.Supp. 210 (N.D. Ill. 1969); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969); *Wheeler v. Dell Publishing Co.*, 300 F.2d 372 (7th Cir. 1962).

Thus, in the instant case not only did the right to sue for the initial violation not accrue until the August 8, 1969, habeas Order, but the cause of action of Petitioners against state and local officials could not have become limitations

barred until immediately after the rendering of the Tax Court opinion on March 26, 1974, when retrieval of the property of Petitioners became finally possible. Having conducted an unlawful search and seizure and having distributed tainted evidence to other public officials, state and local officers were duty bound to retrieve the property of Petitioners and return same to them. As long as the personalty of Petitioners remained in the hands of public officials, who obstinately insisted on using same and refused to return same, the invasion of privacy and violation of constitutional rights was continuing in nature through and until 1974 and, thus, the June 3, 1970, Complaint of Petitioners certainly was barred by no Statute of Limitations, no matter how short. Petitioners respectfully submit this is the constitutionally mandated guideline which should be adopted by this Court, so that undisputed violations of constitutional rights may be duly vindicated without application of unreasonable state prohibitions and technicalities to prevent assertion of a claim.

CONCLUSION

In *United States v. Janis*, October Term, 1974, Case No. 74-958, this Court will have the silver platter doctrine before it, for current review. At issue in *Janis* is whether the I.R.S. may wait in the wings and take custody of illegally seized documents for use in a fresh, newly constructed federal civil tax proceeding, following an unlawful search and seizure by state and local law enforcement officers.

Candidly, Petitioners in this case would hope that, on the merits, this Court in *Janis* will re-affirm the viability of the silver platter doctrine, as against a transferee agency who has used copies of the illegally seized evidence in a newly framed proceeding. To hold that the transferor cannot use the tainted evidence, but that the transferee can, does little to protect the fundamental constitutional rights of the injured party. Rather, it lays open the injured party, as in *Janis* and here, to a series of parallel, purportedly independent prosecutions by various state and federal regulatory authorities. Such a result, it is submitted, is constitutionally offensive.

Even if this Court decides the *Janis* case in favor of the Respondent, that will not, however, dispose of the equally important current issues concerning proper discipline of raiding officers, responsible for commission of the constitutional torts here involved.

Is the victim of the unconstitutional search and seizure to bear the total costs and fees incurred in vindicating himself? Is it not the meaning and intent of *Bivens v. Six Unknown Agents* and the federal Civil Rights Acts that

injured parties, having been unconstitutionally violated, be advanced, in all fairness, sufficient sums to make them whole?

It is submitted that there can be and should be no weakening of the civil rights of an injured party, in a proceeding against officials of the government for *misuse* of wrongfully seized evidence, received on a "silver platter".

On the other hand, should this Court rule for the Petitioner in the *Janis* case, and allow the use of tainted evidence by a supposedly innocent federal civil tax authority, this should in no way be construed to excuse raiding officers from their independent responsibility for having conducted an illegal raid. Indeed, if the transferee is to be permitted effective utilization of illegally seized evidence in an independent prosecution, that would seem to be all the more reason to strengthen, rather than weaken, the injured parties' civil rights as against the group of agencies who conducted the illegal raid, search and seizure, in the first instance.

In the instant case, there is a further complexity—namely, that the federal agents, here involved, have not been entirely innocent. The I.R.S. was gleefully waiting in the wings for copies of the illegally seized evidence. They used the tainted proof as the sole basis for instituting a hitherto unprosecuted "civil" tax case. Also, the agency's bad faith was demonstrated by its approach, initially seeking a fraud penalty and then later watering it down to a negligence penalty, the aim being to shift the burden of proof from the I.R.S. to Petitioners, to further aggravate the prejudice arising from the I.R.S.'s reliance upon illegally seized evidence.

The I.R.S. must have recognized for almost two years that the major battleground over the validity of the search and seizure was the criminal proceedings. Had the I.R.S. *not* felt said proceedings to be relevant, there would be no reason for the agency to initiate successive requests for continuance of the Tax Court trial.

Having lost the District Court trial, the I.R.S. continued to exert pressure upon Petitioners, by defying the state criminal court's turnover Order, by subpoenaing the defense counsel to the Tax Court trial and by refusing to adjudicate the simple, legal question of privity, either in the habeas corpus case or in the federal civil rights action below. Instead, the I.R.S. insisted that Petitioners "exhaust" their remedy before the Tax Court, requiring that they hire and pay for tax counsel to represent them in that proceeding.

The I.R.S. did not even stop here. They also insisted that Petitioners completely re-litigate the entire search and seizure issue, not only on the law, but on the facts. Thus, improper receipt, in the first instance, has been coupled here with oppressive use of the tainted evidence. Historically, the practice has been that upon a finding of illegal search and seizure of non-contraband evidence, the injured party is not only free of any wrongful prosecution, state or federal, but he is to be returned to the status quo, Thus, as in the case of the Florida statutory practice, the illegally seized evidence is to be restored to the aggrieved party. FLA. STAT. § 933.14.

That same spirit of restoration should apply in respect to the damage entitlement of the aggrieved party. In other words, where one has been subjected to an unconstitutional raid, the costs and fees of vindicating constitutional rights

should, it is submitted, be assured in a federal civil proceeding that is not encrusted with overly protective "defenses" [such as limitations or immunities]. Liberal federal standards should be here applied in order that constitutional policy be fulfilled through vigilant pursuit of civil rights invaders.

This Court has already indicated, in granting certiorari in *United States v. Janis*, that it intends to give current review to the effect of illegality upon a transferee agency's authority to use illegally seized evidence. At the same time, it is submitted, this Court should give current review to the rights of the aggrieved party, not only as against the transferee agency, but as against the transferor agents and those in privity with them.

For the above and foregoing reasons, it is respectfully prayed that this Court grant certiorari in this case. It would also be prayed that oral argument in this case be set at the same time as that in *Janis*, Case No. 74-958.

Respectfully submitted,

STANLEY JAY BARTEL,
ESQUIRE
NORIEGA and BARTEL, P.A.
Attorneys for Petitioners
2100 First Federal Building
One S.E. Third Avenue
Miami, Florida 33131

By LARRY H. SCHATZ
for Stanley Jay Bartel

[Bill Shuford, Jr., of counsel on the Petition].

APPENDIX

I

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1034

EFRAIN T. SUAREZ,
joined by his wife,
ZENAIDA SUAREZ,
Plaintiffs-Appellants,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections, et al,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(April 2, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges:

TUTTLE, Circuit Judge:

We here deal with the final chapter in a tale of three lawsuits arising in the Southern District of Florida, as a result of which the original plaintiff, the appellant here, has, by action of the United States Tax Court, received full relief in the matters originally litigated but who now complains that the trial court declined to award him his attorney's fees.

Suarez has been attempting for some five years to prevent the Internal Revenue Service from utilizing copies of records which had been seized from his office on January 3, 1964 by police officers of Dade County, Florida and which had been used to produce his conviction for performing illegal abortions. The first of these efforts was made in connection with his filing a petition for release from the state court conviction by writ of habeas corpus on the ground that his conviction had been obtained by the use of the illegally seized records. Asserting that the state officials had furnished copies of the records to the Internal Revenue Service agents, he amended his petition for habeas corpus to seek an injunction against the IRS officials. He subsequently filed a second civil suit seeking an injunction against the use of evidence, based on alleged violations of his Fourth and Fifth Amendment rights.

Following the grant of the writ of habeas corpus by the federal court, Suarez was released from his state conviction and was not brought to trial a second time. Thereupon the state court issued an order directing all officers, both state and federal, to surrender the records and all copies thereof to the plaintiff. Upon the failure of the Internal Revenue officials to return the copies that they possessed criminal contempt proceedings were filed in the state court against the federal officials. This case was removed to the federal court, and this became the third prong of the litigation which we now bring to a close. Claims for damages against the state and federal officials for their illegal use of the evidence have been abandoned by the appellant.

The trial court dismissed the removed state criminal contempt proceedings and initially granted a preliminary

injunction against the use by the federal officials of the illegally obtained evidence. However, when the case came on for final hearing, the trial court dismissed the other two complaints as well, primarily on the authority of Brittingham v. C.I.R., 451 F.2d 315 (5th Cir. 1971). The trial court noted that the question whether the evidence obtained from the illegal search by the state officers could be used in the civil tax proceeding which had been instituted on behalf of the federal agents upon having received access to the documents taken from Suarez's office could be determined in the Tax Court upon proper motion being made by the taxpayer.

The trial court dismissed the claim for damages against the state officials on the ground that any action against them was barred by the three-year statute of limitations. The court also found that there was no personal liability on the part of the federal officers, because, unlike the case in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) there was no unconstitutional activity undertaken by the agents themselves, but rather they were operating solely within their official capacity. The court held further that the Federal Tort Claims Act did not waive sovereign immunity because it expressly provides that its waiver of immunity was not applicable to claims arising out of the assessment or collection of a tax.

As contemplated by the district court, the Tax Court, upon motion duly made by the taxpayer, held in a well-considered opinion that the evidence obtained by virtue of the illegal raid could not be utilized in the civil tax case against Suarez. It held that the concession by the Commissioner that his determination of some $700,000 of tax deficiency was based solely upon the illegally seized rec-

ords destroyed the presumption of correctness of the determination. A decision was therefore entered in favor of the taxpayer. Suarez v. Commissioner, 58 T.C. No. 78 (Filed Aug. 10, 1972). Although notice of appeal was filed by the Commissioner in the tax case, the appeal was subsequently dismissed by stipulation. Thus, Dr. Suarez's original complaint, which had as its purpose the prevention of the use by the IRS agents of the illegally obtained evidence in a tax case against him, was mooted. There is therefore nothing left on the merits of the original three complaints which were dismissed by the trial court, and which are on appeal here now.

However, Dr. Suarez contends that the effort and delay and concern which he suffered before finally prevailing on the principal issue warrants his recovering an attorney's fee against the federal officials. He claimed against the state officials as well, but it is clear that any claim against them, even if otherwise permissible, cf., Named Individual Members San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017, 1026 (5th Cir. 1974) would be barred by the statute of limitations.

We can find no basis on which attorney's fees could be allowed in this kind of action against the federal officials. In fact, as pointed out in the San Antonio case just cited we noted that the parties there conceded that the federal defendants are immunized from an award of attorney's fees by provisions of 28 U.S.C. § 2412.[1]

[1]This section provides as follows:

§ 2412. Costs.

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507, § 1, 89 Stat. 308.

As we have stated, the injunction issue has been mooted by the action of the Tax Court, taken following the decision of the district court in these cases. In such circumstances there is nothing left to be tried. The appeal must therefore be dismissed.

APPENDIX B

[TITLE OMITTED]

PETITION FOR RE-HEARING

Plaintiffs-Appellants, EFRAIN T. SUAREZ, and ZENAIDA SUAREZ, respectfully petition this Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a re-hearing, upon the grounds that this Court, in affirming, overlooked or misapprehended the following:

1. This Court, in affirming a dismissal of Plaintiffs' Amended Complaint, as a matter of law, as against federal officials, did so exclusively basing the panel's Opinion upon a so-called Immunity Statute, 28 U.S.C. § 2412. That statute, however, has two qualifications, here material, which the Court, in its Opinion, has failed to consider or discuss.

2. The first provision, pertinent to the so-called Immunity Statute, is the exception provided in the first sentence thereof. The prohibition against the award of fees is applicable "except as provided by statute."

3. There is, here, a specific statute involved to-wit, 42 U.S.C. § 1983. In the Amended Complaint, copy appended, Plaintiffs charge the federal officials with acting in concert with state officials to violate Plaintiffs' civil rights under the Civil Rights Act. Thus, reading the attached Amended Complaint in a light most favorable to the Plaintiffs-Appellants, it cannot be said, as a matter of law, that the Amended Complaint fails to come within the exception, to-wit, a viable claim for relief, against both federal and state officials, for violation of 42 U.S.C. § 1983.

4. A second, more important exception, lies in the Immunity Statute itself. This, too, the panel has overlooked and failed to discuss in its Opinion.

The immunity provisions of 28 U.S.C. § 2412 are stated in that statute to be applicable only to an agency or official "acting in his official capacity."

5. Plaintiffs-Appellants respectfully submit to the Court that the case law and statutory history here applicable provide accepted judicial meaning to the clause of "acting in an official capacity." Excluded therefrom, is any official who acts unconstitutionally.

6. Stated another way, whenever a federal official acts unconstitutionally, he is stripped of his official capacity and treated just as any mere law breaker. This is the essence of a whole host of cases, especially those in-

volving civil rights violations, wherein judgments for damages have been rendered against federal officials who have acted unconstitutionally.

7. This is, in essence, the basis for the statement in Bivens v. Six Unknown Agents, 403 U.S. 338, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971), wherein it is specifically held that federal officials are answerable in damages, for complicity in unconstitutional invasion of premises without warrant, as here.

That the foregoing reasoning is sound, is confirmed by a review of the very case which is relied upon in the opinion, as supposed support for affirmance in respect to federal officials. The San Antonio case, 496 F.2d at 1025-1026, deals with Plaintiffs suing to implement a public program. So, too, does the Edelman case, upon which this Court relies at page 1026 of its San Antonio Opinion.

8. The San Antonio case itself, further goes on to point out,

> "Plaintiffs do not contend that their efforts in this environmental case have been made inordinately difficult by actions of defendants taken in bad faith or for oppressive reasons. There is, accordingly, no indication of unreasonable or obdurate obstinacy or vexatious or groundless conduct."

9. The SUAREZ', by contrast, complain specifically and at length that the federal officials, as well as the state officials are, in this case, guilty of unreasonableness; ob-

durateness; obstinacy and vexation. They also suggest that, in light of the long history of the Silver Platter Doctrine, the federal officials' insistence, after DR. SUAREZ prevailed in habeas corpus, upon relitigating the very same issue de novo, without any justifiable basis in evidence to expect a different result, was "groundless conduct." There is extreme "obstinacy."

10. If one re-reads the SUAREZ' Amended Complaint appended hereto, all five San Antonio exceptions appear. There is, here "unreasonableness;" "obdurateness;" "vexatious conduct" and "groundless conduct."

11. Thus, when one goes to the case relied upon in the instant Opinion, San Antonio itself establishes that a viable claim for relief is here stated.

12. The Court has also made short shrift of Plaintiffs-Appellants' arguments as to why limitations should not here be held applicable as against state officials.

This Court has not said that state officials are immunized in respect to a claim by the SUAREZ'. If they are not immunized then they are arguably, potentially liable therefor.

13. The damages here being sought are damages which were being sustained up to and including the moment when DR. SUAREZ prevailed in federal habeas corpus. Those damages were ongoing.

While the bullet may have been fired some years earlier, the shot would not come to rest until after DR.

SUAREZ prevailed in federal habeas corpus; secured an order that it was too late to reprosecute him without the tainted evidence and then secured an order for the return of these illegally seized items to his counsel.

14. Plaintiffs-Appellants respectfully submit, accordingly, that in respect to their damage claim against state officials, that they were here suffering ongoing damages, by way of a continuing constitutional tort. As to the attorneys fees portion of their claim it should be held that limitations did not begin to run until after they had been vindicated as to the unconstitutional state court proceeding and had full restitution under the state criminal restitutionary provisions.

15. If the SUAREZ' were seeking to recover for physical damages to the clinic premises or to the person of DR. SUAREZ, for "roughing up" on the date of his arrest, it is quite clear that as to these claims he would be limitations-bound as to the raiding officers.

What DR. SUAREZ is stating, however, is that there were continuing consequential damages suffered and that limitation did not begin to run as to these until the constitutional imposition was corrected and restitution made as to the illegally seized items.

16. Plaintiffs-Appellants further point out that they are only here seeking to have the Amended Complaint sustained, as stating a claim for relief. Both state officials and federal officials may well have individual immunity arguments which could be legitimately raised as defenses.

17. Plaintiffs-Appellants submit, however, that there are no absolute immunities, here applicable, as a matter of law. The various cases cited in Appellants' 1975 Memorandum reflected a multitude of viable claims, being sustained, for illegal search and seizure by state and federal officials. These are certainly not matters which should be disposed of as a matter of law by premature dismissal of the Amended Complaint.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Re-Hearing, was served upon GILBERT E. ANDREWS, ESQUIRE, Chief Appellate Section, U.S. Department of Justice, Washington, D.C. 20530; GAIL FELS, ESQUIRE, Fels and Fels, 1320 South Dixie Highway, Coral Gables, Florida; STUART SIMONS, County Attorney, Dade County Courthouse, Miami, Florida; and JOHN F. ELOYD, City Attorney, 65 S.W. First Street, Miami, Florida, this 15th day of April, 1975.

NORIEGA AND BARTEL, P.A.
Attorneys for Plaintiffs-Appellants
2100 First Federal Building
One S.E. Third Avenue
Miami, Florida 33131

By: /s/ Stanley Jay Bartel
STANLEY JAY BARTEL

APPENDIX C

[TITLE OMITTED]

[Filed Apr. 30, 1975]

ON PETITION FOR REHEARING

(April 30, 1975)

Before TUTTLE, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

No. 72-1034

EFRAIN T. SUAREZ,
joined by his wife,
ZENAIDA SUAREZ,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT,
Director of Division of Corrections,
State of Florida, et al.,

Defendants.

AMENDED COMPLAINT

Plaintiffs bring this Amended Complaint, seeking injunctive relief and damages, and say:

COUNT I

(TO ENJOIN FEDERAL USE OF
TAINTED EVIDENCE)

1. This Count arises under the United States Constitution and, in particular, the provisions of the First, Fourth and Fifth Amendments to the United States Constitution, the Fourteenth Amendment to the United States

Constitution and under the laws of the United States, more particularly, Title 28 U.S. Code, Sections 1331, 1340, 1343, 1346 and 1357.

2. The Defendants on this Count are the UNITED STATES OF AMERICA and all of its agencies or employees, or employees or agents of any of the said agencies, including but not limited to, RANDOLPH W. THROWER, Commissioner of Internal Revenue; JOHN N. MITCHELL, Attorney General of the United States; ANDREW J. O'DONNELL, JR., District Director of Internal Revenue; HENRY C. STOCKELL, JR., Regional Counsel, Internal Revenue Service; LOUIS M. TIGH, Chief, Appellate Division, Internal Revenue Service; DICK ELLIOTT, Chief of Intelligence Division, Internal Revenue Service; GLENN GILSON, Trial Attorney, Office of the Assistant Regional Counsel of Internal Revenue Service; HOMER C. CLINE, Special Agent, Intelligence Division, Internal Revenue Service; ROGER T. CABLE, Revenue Officer, Internal Revenue Service, and each of the said named individuals' successors and subordinates (sometimes hereafter referred to collectively as "the Federal Defendants").

3. Plaintiffs, while living in the Southern District of Florida, filed with the District Director of Internal Revenue, Jacksonville, Florida, U.S. Income Tax Returns for the years 1963 and 1964.

4. On or about January 3, 1964, agents of the State Attorney's office in and for Dade County, Florida and the City of Miami Police Department, conducted a raid upon premises, wherein Plaintiff was located, at 574 S.W. First Street, Miami, Dade County, Florida.

5. It has been held, as between the State of Florida and EFRAIN T. SUAREZ, that Plaintiff, EFRAIN T. SUAREZ, was subjected to an illegal entry, search and seizure, on the said premises.

6. This was determined in a proceeding which intially began in the Criminal Court of Record in and for Dade County, Florida, Case Nos. 64-457, 64-3116 and/or 64-3417. The ultimate adjudication of illegality was made by this Court, in federal habeas corpus proceedings, Case No. 69-145-Civ-WM.

7. The results of the said habeas corpus case have become final.

8. In the State Court action above described, the Criminal Court of Record Judge had entered an Order dismissing the state criminal charges against Plaintiff, EFRAIN T. SUAREZ.

9. On May 22, 1970, the Criminal Court of Record Judge, in the said action, ordered and directed that all illegally seized evidence, including copies of same, be returned to the within Plaintiff. His Order included not only those who intially seized the subject evidence, but those in privity with them, including transferees.

10. The Federal Defendants are transferees of originals and/or copies of evidence seized in this raid which has been held, as aforedescribed, to have been illegal vis a vis Plaintiff, EFRAIN T. SUAREZ.

11. The Federal Defendants, and in particular the Tax Officials and agencies, have asserted a deficiency

against the within Plaintiffs, for the years 1963 and 1964, which is directly predicated, by the admission of the Defendant Tax Officials, upon the evidence illegally seized in the aforementioned raid of January 3, 1964.

12. The Defendant Tax Officials have admitted, clearly and unequivocally, in the Tax Court of the United States (Stipulation of Facts) that:

> "14. The Internal Revenue Service came into possession of a photocopy of petitioner's daily records or appointment sheets, which were seized in the aforementioned raid on January 3, 1964. These daily records together with leads derived therefrom are the sole basis for respondent's determination herein, including the statutory notice of deficiency." (Emphasis supplied)

13. Plaintiffs assert that, as a matter of law, they are entitled to enjoin any transferee from the use, directly or indirectly, of any evidence held as between the State of Florida and the Plaintiff, EFRAIN T. SUAREZ, to have been the product of an illegal search and seizure, based upon the final determination thereof, heretofore described.

14. Plaintiffs further assert that under established State procedure, ancillary to the final disposition of the State Court criminal case aforedescribed, the State Court was authorized to and did properly determine that Plaintiff, EFRAIN T. SUAREZ, was entitled to the return of the original and all copies of documents seized in the raid aforedescribed.

15. The Federal Defendants, being admitted transferees of such tainted documents, are thus required, as a matter of law, to abide by the State Criminal Court determination and to turn over the said documentation to the Plaintiff.

16. The Federal Defendants, and in particular the Federal Tax Officials, procured their initial copies of the tainted evidence aforedescribed almost immediately following the raid of January 3, 1964.

17. Initially, the said Defendants asserted a fraud penalty, in addition to a deficiency for principal and interest but ultimately, in order to take further improper advantage of the illegal evidence aforedescribed, it was determined to eliminate such a fraud penalty, in that it would have placed a burden of proof, before the Tax Court of the United States, upon the Defendant, Commissioner of Internal Revenue. Instead, the deficiency was amended to seek negligence penalties only, with the result that, under established Tax Court procedure, the burden of disproving the deficiency falls upon the within Plaintiffs.

18. For Governmental Officials, even in pursuit of such an honorable end as the collection of taxes, to obtain evidence held to have been illegally seized, by another Government agency, and to thereafter seek to utilize it as a predicate for thrusting the burden of disproof upon the within Plaintiffs, who include the party aggrieved by the subject raid, is to violate the Constitutional rights of the within Plaintiffs, more particularly those of the Plaintiff, EFRAIN T. SUAREZ.

19. The determination of illegality, as between the transferor and Plaintiff, EFRAIN T. SUAREZ, became final before the commencement of any Tax Court trial.

20. Once that determination became final and the Plaintiffs being entitled to their requested relief herein, as a matter of law, Plaintiffs respectfully submit their entitlement to the immediate relief herein requested, notwithstanding any rights that they might have before the Tax Court.

21. The Tax Court is not, traditionally, suited to a vindication of the constitutional rights of citizenry, particularly those which derive from a criminal context.

22. More critical, however, in establishing Plaintiffs' entitlement to immediate relief from this Court, is the fact that as between the transferor of the subject evidence and the Plaintiff, EFRAIN T. SUAREZ, the matter of illegality has been finally determined.

23. The transferee has no better standing than that of the transferor, to retain the tainted evidence and Plaintiffs' being entitled, as a matter of law, to prohibit use of the said tainted evidence by a transferee who is another governmental agency, there is, in law, no requirement that would compel Plaintiffs to wait any longer for a full vindication of their rights in respect to the invasion of privacy heretofore determined.

24. This complaint does not seek to enjoin any Tax Court proceedings. It seeks only to enjoin transferees of certain tainted documentary evidence from using the same or any leads derived therefrom.

25. Under traditional doctrines of privity, the Federal Defendants are bound by the results of the prior determination in the case which originated in the State Criminal Court, as between the State of Florida and EFRAIN T. SUAREZ.

26. The Federal Defendants, accordingly, have no right to re-litigate the question as to the validity of the entry, search or seizure of January 3, 1964 but, rather, they are bound by it, as parties in privy with those transferors whose rights have been finally adjudicated, as aforedescribed.

27. Plaintiffs have no adequate remedy, in the Tax Court, if, under the circumstances of this case, they are to be required to demonstrate such.

28. The Tax Court does not acknowledge that, in civil matters, Internal Revenue Agents are bound by criminal court determinations as to illegality in the procurement of evidence.

29. In that Plaintiffs' rights cannot be quickly and adequately vindicated, in the Tax Court, they are thus without an adequate remedy elsewhere.

30. They are further without an adequate remedy, in the Tax Court, if, again, they must demonstrate such, in that if it should be determined, in pre-trial hearings, that immediate relief, in full, is not to be granted to Plaintiffs, there are no interlocutory appellate proceedings, from any such Tax Court ruling. According, with the absence of interlocutory appellate remedies and the burden of proof, upon Plaintiffs, under Tax Court procedural rules, it would

thereafter be necessary for the Plaintiffs to take the stand and disprove the deficiency asserted which, notwithstanding that Plaintiffs reported some $247,000.00 in gross income for the two said years, has been asserted at the astronomical level of more than $750,000.00.

31. Plaintiff, EFRAIN T. SUAREZ, would be further prejudiced, by having to take the stand in the said civil case, in order to avoid what would otherwise be an automatic deficiency assessment against him and his wife, in that he is, by profession, a doctor.

32. The activities, which are the alleged subject of the deficiency asserted, have to do with an allegation that illegal abortion activities were being conducted on the premises at 574 S.W. First Street, Miami, Florida, which is the scene of the same premises which was raided.

33. If, in order to vindicate himself in the Tax Court case aforedescribed, the Plaintiff, EFRAIN T. SUAREZ, were to be required to take the stand and testify, he might incriminate himself with respect to his professional activities.

34. Plaintiff, who by definition, has been subjected to an illegal search and seizure and who, in law, is entitled to enjoy the benefits of the exclusionary rule vis a vis all governmental agencies, initial or transferee, ought not be required to undergo the improper choice between remaining silent and suffering an automatic tax deficiency of astronomical proportions which Plaintiffs represent to this Court they are unable to either pay or supersede on appeal, or if Plaintiff, EFRAIN T. SUAREZ, should take

the stand in the said civil tax case, suffer the adverse consequences of destroying his means of livelihood, via loss of license and rights of practice in this or any other jurisdiction.

35. This is a clear case involving threatened conduct by Federal Officials, not State Officials.

36. The abstention doctrine, therefore, which has recently come to the fore, with respect to enjoining matters pending in State Courts, thus has no relevance.

37. Plaintiffs here ask this Court to vindicate their established constitutional rights by enforcing them as against Federal Officials.

38. Once a threatened violation of Federal standards as to search and seizure is demonstrated, as here, this Court, to insure that those standards are maintained and effectuated, is duty-bound to grant relief and to immediately enjoin those Federal Officials from persisting in the use of evidence which, by Federal standards, is tainted. Navarro v. United States, 429 F.2d 928 (5th Cir. 1970).

WHEREFORE, upon Count I hereof, Plaintiffs pray for the full amplitude of equitable relief, including an injunction, temporary and permanent, and for such other and further relief as may be meet and proper.

COUNT II

TO RECOVER DAMAGES AGAINST FEDERAL OFFICIALS FOR USE OF TAINTED EVIDENCE

39. Plaintiffs reallege and incorporate herein by reference, the entirety of Count I, excluding the prayer for relief.

40. The Defendants in this Count are those various officials, including their successors and subordinates, sued in Count I. The UNITED STATES, however, is not included as a party Defendant in this Count.

41. Plaintiffs assert that the use and reliance by the Federal Official Defendants, of the tainted evidence abovedescribed, constitutes a violation of the constitutional rights of the Plaintiffs to be free of civil tax prosecution emanating from the use of illegally seized evidence.

42. Plaintiffs assert that the use of the subject evidence and copies, by the Defendant Federal Officials, between the raid of January 3, 1964 and the results of the habeas corpus case abovedescribed, announced in August, 1969, was made with full knowledge that the constitutionality of the entry, search and seizure were under continuing court attack.

43. By reason of this knowledge, the Defendant Federal Officials acted at their peril in pursuing their tax investigation and civil tax case.

44. Certainly, at least, since the issuance of the habeas corpus Order of August, 1969, the Defendant Fed-

eral Officials have been knowingly acting in violation of Plaintiffs' constitutional rights, in seeking to predicate a civil tax case exclusively upon tainted evidence.

45. Finally, since May 22, 1970, the Defendant Federal Officials have knowingly violated the constitutional rights of the within Plaintiffs in refusing, notwithstanding State Court Order directed specifically at them, as transferees, to return all copies of tainted evidence.

46. Plaintiffs assert that they are entitled to damages, from the Federal Officials or such of them as actually participated, in whole or in part, in the use of the tainted evidence for civil tax prosecution.

47. Plaintiffs assert their entitlement to damages:

(a) Under the constitutional tort rule recently affirmed in the Bivens case;

(b) Under the common law of the State of Florida; and

(c) Under Title 42, United States Code, Sections 1983, 1985(2) and 1985(3).

48. With respect to their claims under the cited provisions of the Civil Rights Act, Plaintiffs assert that, notwithstanding that the Defendant Federal Officials are proceeding to seek to collect taxes under Federal statute, they have obtained and continued to hold their copies of the tainted evidence under color of State statute.

49. With respect to their claim asserted under Section 1985(2), Plaintiffs assert that two or more of the individual Federal Official Defendants did conspire, in the State of Florida, for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Florida, with intent to deny to the Plaintiffs the equal protection of the laws and to injure and deprive them of their rights to equal protection of the laws. Plaintiffs are entitled to the due course of justice reflected in the State Criminal Court dismissal and turnover Order and to equal protection of the laws, in respect to a decision of a court of competent jurisdiction, of the State of Florida, determining that Plaintiff, EFRAIN T. SUAREZ, had been subjected to an illegal search and seizure and directing the return to him as relief ancillary thereto, of the originals and all copies of evidence seized.

50. With respect to their claim under Section 1985(3), Plaintiffs assert that two or more of the individual Federal Official Defendants did go upon the highway, in the State of Florida and County of Dade, for the purpose of depriving Plaintiffs of equal protection of the laws and of their privileges and immunities under the laws and for the purpose of preventing Plaintiffs and hindering the constituted authorities of the State of Florida, giving and securing to Plaintiff, EFRAIN T. SUAREZ, within the State of Florida, the equal protection of the laws and that of the enforcement of the Orders of the Criminal Court of Record. Plaintiffs also assert that these same Federal Official Defendants, or other of that class, did engage in the State of Florida, or cause to be done, in the State of Florida, acts in furtherance of the object of the said conspiracy whereby Plaintiffs have been injured in their person and property.

51. Plaintiffs seek, as damages, their attorneys' fees in various court proceedings, both here and before the Tax Court, together with their attorneys' fees in resisting the deficiency assessment out of court. Plaintiffs further seek, as part of these damages, various costs and disbursements that they have been forced to incur, including not only the usual costs, billed by their attorneys, but such items as travel to and from court and other litigation oriented expenses directly advanced by them in reference to the tax deficiency here in issue.

52. Plaintiffs' damages exceed the sum of $10,000.00 on this Count.

WHEREFORE, Plaintiffs pray for damages against the Defendants in this Count, in excess of $10,000.00 and for their costs.

COUNT III

(FOR DAMAGES AGAINST COUNTY AND MUNICIPAL RAIDING OFFICERS)

53. Plaintiffs reallege and incorporate herein by reference the entirety of Counts I and II, excluding those matters specifically related to their Civil Rights Acts claims therein and to their prayer for relief therein.

54. The Defendants on this Count are RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, and those of his Assistants or investigators who actually participated, in any manner, in the raid of January 3, 1964, together with BERNARD L. GARMIRE, Chief of Police of the City of Miami,

State of Florida, and those of his assistants or investigators who actually participated, in any manner, in the said raid of January 3, 1964, together with such, if any, successor in office as may have or hereafter suceed the said RICHARD E. GERSTEIN or BERNARD L. GARMIRE.

55. The Defendants, in this Count, are, respectively, the State Attorney and the Chief of Police who are, respectively, the pertinent County and City department heads. The other Defendants in this Count, County and State, are the actual raiding officers.

56. Finally, in this Count, Plaintiffs seek damage judgments against the County of Dade and City of Miami, respectively.

57. With respect to this Count, Plaintiffs seek, initially, to recover compensatory damages from those County and Municipal Officials, abovedescribed, who actually participated in the raid of January 3, 1964.

58. Plaintiffs seek relief in this Count, in that the conduct of the said raiding officials constituted a violation of Plaintiffs' constitutional rights as reflected in the Bivens rule; their rights to be free of unlawful invasion of premises or of their privacy, under State law; and their rights under the previously cited provisions of the Civil Rights Act.

59. With respect to the Civil Rights Act, the color or law involved in this Count was the purported authority of State law to make a raid upon the premises at 574 S.W. First Street, Miami, Dade County, Florida, on January 3, 1964. The use of the highways; violation of due process,

equal protection and the other rights required to be asserted in connection with Sections 1985(2) and 1985(3) are all obvious. The raid in question represented a combined activity between County and City officials, with extensive pre-planning, whereby, without warrant, they broke and entered into premises in which Plaintiff was thereupon arrested, following which these said County and Municipal Officials conducted a general, exploratory search, without obtaining warrant, into areas beyond the area in which Plaintiff, EFRAIN T. SUAREZ was arrested and otherwise violated the constitutional rights of the Plaintiff, EFRAIN T. SUAREZ, to be free of an illegal search and seizure.

60. The department head Defendants, in this Count, are sued on the theory that they, as responsible superiors to the raiding officers, failed to properly train and/or instruct their subordinates as to the manner of conducting a lawful raid of premises.

61. The County and City Defendants on this Count are added in view of the apparent undermining of certain ancient doctrines of immunity. It would now appear that both the County and City, as the employers of the respective raiding officers, are equally liable for the torts, constitutional and otherwise, and that, if judgments be available herein against any individual raiding officers, his respective employer should likewise be found liable.

62. Plaintiffs assert that none of the Defendants in this Count has any defense, with respect to the issue of liability.

63. Plaintiffs assert that the determination of an illegal raid, hereinabove referred to, is final and binding upon all those officers who participated in the raid or who are responsible therefor.

64. Plaintiffs assert, therefore, their entitlement to a judgment, as a matter of law, with respect to liability on this Count, saving unto the Defendants on this Count the right to defend as to damages.

WHEREFORE, Plaintiffs pray for damages in excess of $10,000.00, upon this Count, and for their costs.

COUNT IV

(FOR DAMAGES AGAINST
STATE AND MUNICIPAL DEFENDANTS
FOR FALSE IMPRISONMENT)

65. Plaintiffs reallege and incorporate herein by reference the entirety of the foregoing Counts, excluding only those matters which have specific reference to the underlying bases for liability or to the prayers for damages.

66. Prior to the determination by this Court, in the habeas corpus action, Plaintiff, EFRAIN T. SUAREZ, notwithstanding his constitutional protests, was convicted and jailed for the crime for which he was arrested in the subject raid of January 3, 1964.

67. Plaintiff, EFRAIN T. SUAREZ, asserts that under new doctrine, with respect to compensating injured parties for invasion of their constitutional rights, Plaintiff, EFRAIN T. SUAREZ, is entitled to recover under

Bivens; under State law and under the cited provisions of the Civil Rights Act for his false imprisonment, commencing with his arrest and detention and to and including all detentions, for the subject charges, until his release from prison in 1969.

WHEREFORE, Plaintiffs pray for damages in excess of $10,000.00, upon this Count, and for costs.

COUNT V

(FOR DAMAGES AGAINST STATE OFFICIALS FOR FAILURE TO PROVIDE SAFE PRISON FACILITIES)

68. Plaintiffs reallege and incorporate herein by reference the entirety of the foregoing Counts, excluding only those matters which have specific reference to the underlying bases for liability or to the prayers for damages.

69. The Defendants on this Count are the STATE OF FLORIDA, Louie L. Wainwright, Director of Division of Corrections, State of Florida, DeWITT SINCLAIR, Superintendent of Raiford Prison, State of Florida, and their respective successors and subordinates.

70. While a prisoner at Raiford, Florida, serving sentence for the conviction which was set aside by virtue of the habeas corpus determination aforedescribed, Plaintiff, EFRAIN T. SUAREZ, was a ward of the Defendants on this Count, in that he was a State prisoner.

71. Among the duties imposed upon the Defendants, as the said Plaintiff's jailers, was and is the duty to pro-

vide Plaintiff with safe prison facilities, particularly facilities safe from savage assaults by gangs of prisoners.

72. Plaintiff asserts, based upon information and belief, that the Defendants on this Count, well prior to the beating which is the subject of this Count, well knew of gang-type forays on the prison premises at Raiford, Florida, but knowingly, negligently and improperly refused to take proper steps to bring a halt to these incidents; that their conduct, in view of the frequency and gravity of physical attacks upon prisoners, known to them, was in reckless disregard of the safety of Plaintiff and other prisoners.

73. While a prisoner, Plaintiff was savagely beaten, about the head, by a gang of fellow prisoners.

74. The failure of the Defendants on this Count to prevent the said beating, was a violation of Plaintiff, EFRAIN T. SUAREZ's rights, under the Constitution as reflected in the Bivens rule, under State law and under the Civil Rights Act, Sections previously cited.

WHEREFORE, Plaintiffs pray for compensatory damages, in excess of $10,000.00, and for the costs of this Count.

IDENTIFICATION OF PARTICIPATING FEDERAL, STATE, COUNTY AND MUNICIPAL OFFICIALS

75. Plaintiffs are unable to detail, with precise accuracy, the names of each and every Federal, State, Coun-

ty or Municipal Official who should be properly joined as an individual party Defendant in this action.

76. Plaintiffs do know the names Michael Daugherty, Barbara Williams, Myrtle Ellison, Glen L. Baron, Malcolm Gracey and Jack Elmore, as having been participants, on behalf of the County and Municipality, in the raid on the premises. Plaintiffs believe that one or more of the named women has changed her name since the initial complaint herein and have been advised that Glen L. Baron is deceased.

77. With respect to tax officials joined in this action, Plaintiffs have named those individuals who are either the pertinent department heads and obviously passed upon or authorized the pursuit of the tax case in issue, together with the name of one or two individuals who are known, from conferences with Plaintiffs' tax counsel, to have participated, in some manner, in the course of the Tax Court case.

78. Plaintiffs require the assistance of discovery in order to be able to precisely identify those Defendants who are asserted to be individually responsible to Plaintiffs, for damages, on the Counts other than Count I.

79. Plaintiffs desire to reserve the right to add these individual Defendants, within the previously designated classes, as their identities are made known during the course of discovery in this action.

80. Plaintiffs also seek to reserve the right, to the extent that it may be necessary or appropriate, to affect

substitution of parties where there have been changes, marriages, deaths and the like, during the course of the pendency of this action.

PAUL, LANDY, BEILEY
& BARTEL
Attorneys for Plaintiffs
341 Pan American Bank Building
Miami, Florida 33131
377-0201

By /s/ Stanley Jay Bartel
Stanley Jay Bartel

APPENDIX E

[TITLE OMITTED]

[October 22, 1971]

ORDER DISMISSING COUNTS I, II, III AND IV OF AMENDED COMPLAINT

The plaintiffs, by an amended complaint in this action, seek relief by way of injunction and damages in five separate counts, and have named as defendants the United States of America, various officials of the Federal Government, all of whom are collectively referred to as the Federal Officials; the State of Florida; the County of Dade; and the City of Miami; and various officials of the State of Florida, the County of Dade and the City of Mi-

ami.[1] Counts I and II of the complaint are directed at the United States and the designated Federal Officials, and seek to enjoin the Federal Government from using evidence allegedly illegally seized. It is clear from the allegations what the plaintiffs basically seek to do is to enjoin the Federal Government from proceeding with a pending Tax Court case instituted by the plaintiff, Efrain T. Suarez, as well as seeking to enjoin the Government from proceeding with any further civil or criminal proceedings against either of the plaintiffs on the basis of the evidence derived directly or indirectly from the allegedly illegal raid on January 3, 1964. Count II of the complaint is directed only at the Federal Officials and seeks relief by way of damages occasioned by the use of the allegedly illegally seized evidence by the Federal Officials. Count III seeks damages from the County of Dade, City of Miami, and the various city and county officials occasioned by the allegedly illegal raid occurring on January 3, 1964. Count IV seeks damages against the various state and municipal defendants for false imprisonment. Count V seeks damages against the State of Florida and the various state officials for failing to provide safe prison facilities.

The facts as are set forth in the amended complaint are as follows: on January 3, 1964, agents of the State's Attorney's office for Dade County, Florida, and the Miami Police Department, conducted a raid of the premises at which the plaintiff, Efrain T. Suarez, hereafter referred to as the plaintiff, was conducting a clinic.

[1]Plaintiffs had originally commenced this action by a nine-count complaint seeking somewhat similar relief by way of injunction and damages which has been replaced and superseded by the amended complaint.

Immediately after the raid, the plaintiff was placed under arrest and charged with the crime of "attempted abortion." He was ultimately tried on this charge and convicted in the Criminal Court of Record in and for Dade County, Florida. At and prior to the trial of the plaintiff, he raised the defense by way of motions that the evidence being used against him, to wit, the material seized in the alleged illegal raid of January 3, 1964, should be suppressed and not used against him. The Trial Court failed to find any illegality in the raid and the resulting search and seizure and denied all such motions. Thereafter, an appeal was taken to the Florida District Court of Appeals, which affirmed the lower court's decision, and both the Florida Supreme Court and the United States Supreme Court declined to grant a writ of certiorari. The plaintiff then sought to obtain relief pursuant to postconviction proceedings under state law, but was unsuccessful.

Then, having exhausted all other remedies, he applied to this Court for a writ of habeas corpus, which was granted on August 6, 1969. This Court granted its writ of habeas corpus on the basis of 28 U.S.C., Section 2254 (d) (8), and found that the record of proceedings in the State Court did not fairly support the factual finding that an exigency existed which excused the police officers from announcing their identity and purpose, thereby making the resulting search and seizure legal. All of the foregoing are set out in greater detail in the opinion of this Court filed August 8, 1969.

While the above events were transpiring, the District Director of Internal Revenue on June 8, 1967, issued a statutory notice of deficiency claiming deficiencies in the income tax liabilities of both the plaintiffs for the calen-

dar years 1963 and 1964. Upon receipt of this statutory notice, the plaintiffs filed a petition with the Tax Court of the United States, seeking a redetermination of the deficiencies set forth therein.

Plaintiffs claim that the present action is one merely to enforce the previous orders of this Court and that this action is not barred by the provisions of 26 U.S.C. § 7421 (a), but rather is an adjunct to the order previously entered by this Court on August 8, 1969. However, the order of this Court on August 8, 1969 granting the writ of habeas corpus did not order suppression of the evidence or pass upon the question of whether the search which took place on January 3, 1964 was legal or illegal, but rather only considered whether or not the record in the State Court proceeding was sufficient to support the State Court's finding that the search was legal.[2] Thus, this Court has never directly passed upon the question of whether the raid conducted on January 3, 1964 was legal or illegal, and nothing in any orders of this Court should be construed as so holding.

The question of whether or not the raid of January 3, 1964 and the ensuing search and seizure was legally sufficient within the meaning of the Fourth Amendment of the Constitution is now under submission before the Tax Court of the United States, together with the question of whether any evidence that may have been obtained illegally may be used to make an assessment or used in that proceeding.

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[2]It should be noted that the orders of this Court of May 4, 1970 and May 5, 1970, and the order of May 22, 1970, of Judge Carling Stedman of the Criminal Court of Record in and for Dade County, Florida, were merely entered to reflect that the State had elected not to retry the plaintiff and that he should therefore be released and that the evidence seized could be returned.

COUNT I

In Count I the plaintiffs seek to restrain the use by Federal Agents of evidence that was obtained in the alleged illegal raid of January 3, 1964. The record shows that such evidence is being used in a Tax Court proceeding. However, as was pointed out, there has not yet been an order of suppression with respect to that evidence. The relief sought against the United States and its Federal Agents in Count I as well as in Count II constitute a suit against the United States to which it has not consented and in accordance with the well-established principle of law of sovereign immunity this suit must be dismissed. Land v. Dollar, 370 U.S. 731; United States v. Shaw, 309 U.S. 495; Louisiana v. McAdo, 234 U.S. 627.

Moreover, this case is clearly controlled by the holding of the United States Court of Appeals for the Fifth Circuit in the recent case of Roberta M. Brittingham v. United States Commissioner of Internal Revenue, et al., No. 71-1281, decided October 4, 1971, ____ F.2d ____. In that case the plaintiff sought to prevent the Commissioner of Internal Revenue from introducing documents in certain cases pending before the Tax Court to prevent the Commissioner from using the documents for any other purpose and to order that the documents be returned to her. The District Court dismissed the case on the basis that the Court lacked the necessary jurisdiction and the complaint failed to state a claim upon which relief could be granted. The Court of Appeals for the Fifth Circuit affirmed the decision of the District Court dismissing the complaint for three reasons. First, it stated that the clearly expressed Congressional policy was that the Courts should not interfere in the tax collection process as is

evidenced by the directive contained in 26 U.S.C. Section 7421(a) and 28 U.S.C., Section 2201. In finding that the Court had no jurisdiction, the Fifth Circuit relied on the case of Koin v. Coyle, 402 F.2d 468 (7th Cir. 1968), a case whose facts are quite similar to the one now before this Court and in which the Court held that Section 7421 (a) prevented the Court from exercising its jurisdiction to grant the injunctive relief by way of passing upon which evidence could be used by the District Director in making the assessment.

The Fifth Circuit then went on in the Brittingham case, supra, to state that in addition to the lack of jurisdiction, that courts of coordinate jurisdiction should not review, enjoin or otherwise interfere with one another's jurisdiction, and that the Tax Court, within its limited jurisdiction, was of equal stature with the District Court.

The Fifth Circuit also held that there was no showing of the absence of an adequate legal remedy because the Tax Court had not yet made a final ruling on the admissibility of the disputed documents and because any decision of the Tax Court once rendered would be fully reviewable in the Court of Appeals.

I find, therefore, that the Brittingham case, supra, is fully controlling and that Count I of the complaint should be dismissed for lack of jurisdiction, and I further find that on the basis of comity this Court should not interefere with the exercise of jurisdiction by the Tax Court over this matter, and that the plaintiffs have an adequate legal remedy in the Tax Court with right of appeal therefrom to the United States Court of Appeals for the Fifth Circuit. Accordingly, Count I of the plaintiffs' complaint should be and hereby is dismissed.

COUNT II

Count II of the amended complaint, which seeks relief by way of damages from the Federal Officials under Sections 1983, 1985(2) and 1985(3), Title 42 U.S.C. stems from the raid and search of the premises which took place on January 3, 1964. It is clear that if such actions are to be brought they must be timely instituted. The Civil Rights Act itself does not specify a period of limitation and therefore the state statute of limitations applies to Count II. Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). Count II of the present action is governed by the three-year statute of limitations set forth in 95.11(5)(a) Florida Statutes. Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970) Since the raid in question was conducted in January of 1964, any cause of action concerning a deprivation of any rights arising out of that raid and search should have been instituted prior to January of 1967. Thus, since this action was first instituted in June of 1970, the cause of action set forth in Count II has not been timely brought and must be and therefore is dismissed. Even if this action were deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.

Moreover, assuming, arguendo, that the action was timely brought, the action set forth in Count II is barred by the doctrine of sovereign immunity. It is clear that while the action is directed only at the Federal defendants, and not toward the United States, it is directed at the action of these Federal Officials in carrying out their official duties. In the case at bar, the Federal Officials

were clearly doing nothing more than what is required of them by Sections 7601, 7602 and 6212 of Title 26 U.S.C., that is, to conduct an investigation to determine the correctness of income tax returns filed by the plaintiffs and in the event they come to the conclusion that the returns are not correct, to determine the deficiency in the tax liability. It is clear that in the absence of express consent to an action such as this an action may not be maintained against the sovereign. The sovereign immunity with respect to the United States with respect to damages sounding in tort, which Count II of this action might now be construed to be, has been specifically waived by the provisions of the Federal Tort Claim Act, Section 2671, Title 28 U.S.C., et seq. This waiver of sovereign immunity is, however, subject to specific exceptions which limit the provisions of that action. One of the exceptions is contained in Section 2680(c), 28 U.S.C., which provides that the provisions of that chapter shall not apply to "any claim arising in respect of the assessment or collection of any tax * * *". In the case at hand, it is readily apparent that the only action taken by the United States, i.e., the conduct of a tax investigation, the determination of a deficiency, the mailing of a statutory notice of deficiency, and the defense of a petition for the redetermination of such deficiency instituted in the Tax Court by plaintiffs clearly all relate to the assessment of a tax. As such, this Court is specifically prohibited to exercise its jurisdiction by Section 2680(c) of Title 28 U.S.C.

Accordingly, I find that Count II is barred by the statute of limitations, and even if it were not barred by the statute of limitations, it is an unconsented suit against the Federal Officials, which is barred by the doctrine of sovereign immunity.

COUNT III

Count III of the complaint is directed against Dade County, the City of Miami, and various officials of the County and City, including the State's Attorney, Chief of Police and their subordinates or assistants who participated in the January 3, 1964 raid. It is clear that any action for damages under the Civil Rights Statutes cannot lie against the City of Miami or Dade County for acts committed in performance of their governmental functions. Monroe v. Pape, 365 U.S. 167 (1961); Mayhue v. City of Plantation, 375 F.2d 447 (5th Cir, 1967); Mareno v. Henckle, 431 F.2d 1299 (5th Cir. 1970); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971). Therefore, the action against the City of Miami and Dade County must be and hereby is dismissed.

With respect to the individually named defendants under Count III, the action must also be dismissed. Count III is founded upon the Civil Rights Statutes and upon claims for deprivation of plaintiffs' constitutional rights based upon the Supreme Court's recognition of such a claim in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The actions of defendants for which damages are sought occurred on January 3, 1964, more than six years prior to the institution of the present action. It is well recognized that because no statute of limitations is specified in the Civil Rights Statutes (which are part of the basis for plaintiffs' claim here) the applicable state limitation periods should be adopted. Shank v. Spruill, 406 F.2d 756 (5th Cir. 1969); Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). The Fifth Circuit has interpreted the Civil Rights Statutes as falling within the three-year limitation period under F.S.

§95.11(5)(a). Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970). Even if this action were deemed to fall within the purview of the more liberal four-year limitation period under F.S. §95.11(4), it would likewise be barred.

Plaintiffs' claims under Count III are, however, founded upon a Bivens claim aside from the Civil Rights Statutes. The Supreme Court when it recognized the existence of a claim founded upon a constitutional deprivation in Bivens did not reach the issue of limitation of that form of action. In the absence of any authority from either the Supreme Court, or the Fifth Circuit, this Court is of the opinion that the claim under Bivens should, by analogy to the Civil Rights Statutes, borrow the state statute of limitations applicable under Nevels v. Wilson, supra. Count III must also be barred under either the three- or four-year Florida Statute, F.S. §95.11, and is therefore dismissed.

COUNT IV

The fourth count of the complaint seeks recovery for false imprisonment apparently from the various state and municipal defendants, although the defendants in this count are not designated with any degree of specificity. This claim is based upon Bivens, the Civil Rights Statutes, and state law.

Again, as in the other counts, supra, state law governs the determination of whether this action has been timely brought. F.S. §95.11(6) specifically provides a two-year period within which actions for false imprisonment must be brought. Plaintiffs' allegations cover the period from Suarez' arrest and detention on January 3, 1964, to and including his release from prison on or about August 6, 1969.

If the two-year period began to run on the former date, then this claim is barred. If, however, the claim can be deemed to have arisen on the latter date, the date of Suarez' release from incarceration, then this claim is not barred. It has not been determined under Florida law when a claim for false imprisonment arises. In Henig v. Odorioso, 256 F.Supp. 276 (E.D. Pa. 1966), aff'd 385 F.2d 491 (3rd Cir. 1967), cert. den. 390 U.S. 1016, (1968) reh. den. 391 U.S. 929 (1968), the plaintiff based a Civil Rights Statute action upon a claim for false arrest, false imprisonment, slander and malicious prosecution. Plaintiff therein was allegedly falsely arrested on March 22, 1962, incarcerated on July 13, 1962, and released on January 25, 1963; the action was filed on October 22, 1964. It was held that under a two-year statute of limitations the claim was barred because the limitations period begins to run on the date the imprisonment commenced. 385 F.2d at 493. A recent case in the Fifth Circuit, Knowles v. Carson, 419 F.2d 369 (5th Cir. 1969), an action alleging civil rights violations stemming from an arrest, held that there was no reason that the statute of limitations should be tolled because the plaintiff was incarcerated. Id. at 370.

This Court is of the opinion that if the Florida Courts were to pass upon the issue, a claim for false imprisonment would be held to arise upon the commencing of the incarceration, rather than upon the date of release. Thus the claim under Count IV is barred, as it was not brought within two years of January 3, 1964, and hence is dismissed.

COUNT V

The fifth count of the complaint seeks recovery of damages from the State of Florida, State Prison officials and their subordinates for an assault by fellow prisoners which allegedly occurred while plaintiff was incarcerated at Raiford Prison. This claim is also founded upon the various sections of the Civil Rights Act, state law, and upon the Constitution as reflected in the Bivens case.

This Court finds that the two-year limitations period provided in F.S. §95.11(6) would be the proper basis upon which to test the claims under this Count. The original complaint in this action was filed on June 3, 1970. Plaintiff was released from Raiford Prison pursuant to this Court's order of August 6, 1969.

Because no date is specified in this complaint as the date of the occurrence of the alleged beating, this Court cannot at this time pass upon the timeliness of this count, except to hold than any claim based upon acts which occurred more than two years prior to the filing of the original complaint in this action must necessarily be barred under the Florida Statute of Limitations. Any claim based upon acts which occurred within the two-year period prior to June 3, 1970 would necessarily withstand dismissal based upon a claim of untimely filing.

DONE and ORDERED at Miami, Florida, this 22nd day of October, 1971.

/s/ W. O. Mehrtens

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 69-145-Civ-WM

EFRAIN T. SUAREZ,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Director, Division of Corrections,
State of Florida,

Respondent.

(Filed Aug. 8, 1969)

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

This is a petition for habeas corpus filed under 28 U.S.C. § 2254. Petitioner Efrain T. Suarez was convicted in the Criminal Court of Record in and for Dade County of attempted abortion and sentenced on March 15, 1965 to three and one-half years. The conviction was affirmed in Rodriguez v. State, 189 So.2d 656 (Fla. Dist. Ct. App. 1966). The Supreme Court of Florida denied certiorari at 196 So.2d 923 and the Supreme Court of the United States denied certiorari at 389 U.S. 848. The denial of petitioner's motion to vacate and set aside the conviction under 33 F.S.A. Rules of Criminal Procedure, Rule 1.850 was affirmed at 220 So.2d 442 (Fla. Dist. Ct. App. 1969). For the reasons stated below the writ is granted.

The conviction is attacked on the grounds that evidence introduced against the petitioner at his trial was illegally seized and therefore violated petitioner's rights under the Fourth Amendment as made applicable to the states through the Fourteenth Amendment. The facts surrounding the seizure of the evidence are as follows. In the fall of 1963 the City of Miami Police received information that the Ayala Clinic in Miami was being used for the performance of abortions. By December 1963 the police and the State Attorney's office, working together, had gathered witness affidavits and a complete lay-out of the interior of the premises of the Ayala Clinic. A plan was formed to raid the premises. The services of two Tampa policewomen were engaged. Barbara Williams, one of the policewomen, called the clinic by phone, pretending to need an abortion, and made an appointment for the morning of January 3, 1964. The plan called for Barbara Williams and Myrtle Ellison, the other Tampa policewoman, to be driven to the Ayala Clinic in a rented taxi cab by a police officer. Members of the police and the State Attorney's office were stationed outside. Pursuant to the plan, Miss Williams passed $1,000.00 in marked bills to petitioner Suarez and was then told to ready herself for the operation. At this point, Officer Ellison asked Dr. Suarez to excuse her. He walked her to the door and let her out, locking the door behind her as she left. She then told the waiting officers that the money had passed hands and that the doctor was going to give Miss Williams a shot. The officers thereupon knocked on the front door to the clinic and stated their identity — "Police officers. State Attorney's Office. Open the door." After waiting somewhere between fifteen and thirty seconds, knocking again and receiving no answer, the officers knocked down the door and forced their way into the clinic. At this time they placed the petitioner and

others under arrest for attempted abortion and seized the articles later admitted into evidence over petitioner's objection. It is undisputed that the officers announced only their identity without ever announcing their purpose in being at the Ayala Clinic until after their forced entry. Neither an arrest warrant nor a search warrant was ever obtained.

The petitioner attacked the entry of the officers and the subsequent search and seizure on three grounds:

1. The announcement of the raiding officers was constitutionally deficient because the officers announced only their authority but not their purpose.

2. The search was illegal because it was an exploratory search made without a warrant when there was ample time to procure one.

3. Even if the entry was legal and a search incidental to arrest permissible, the search was a broad and exploratory one exceeding such authority.

In view of the disposition of the first ground raised it is not necessary to consider the other two. The cause was submitted to this court on the briefs and oral arguments of counsel and a transcript of each of the state court proceedings. There was a question raised in the briefs and on oral argument as to whether petitioner had exhausted his state remedies on the third ground asserted relating to the exploratory search. I find that this ground was in fact presented to the state courts. See Suarez v. State, 220 So.2d 442, 444 (Col. B).

Preliminarily it is noted that if there ever was any doubt about the availability of federal habeas corpus to a state prisoner attacking the constitutionality of the seizure of evidence introduced against him at trial, that doubt has been effectively erased by the Supreme Court. Kaufman v. United States, ____ U.S. ____, 89 S.Ct. 1068, ____ L.Ed.2d ____ (1969).

Petitioner's primary contention is that the entry of the police and State Attorney officers was illegal because only half of the constitutionally required announcement of identity and purpose was made and that, therefore, the evidence seized should have been suppressed.

It is clear that an announcement of both identity and purpose is required before officers may break into premises whether they are armed with warrants or not. Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); United States v. Gable, 276 F.Supp. 555 (E.D. Pa. 1967); United States v. Barrow, 212 F.Supp. 837 (E.D. Pa. 1962). It also seems clear that one exception to the requirement of an announcement exists where there is a reasonable belief on the part of the entering officers that an exigency exists whereby evidence will be destroyed or someone's safety imperiled. Ibid. After hearing testimony and argument on the motion to suppress, the trial judge in the state court found that there was ground for the policemen who were waiting outside to believe, as they had testified, that Policewoman Williams was in danger of some harm from a hypodermic needle or other instrument which would be used in an attempted operation on her. (R. 95) Accordingly, he found an exigency existed which excused the officers from making an announcement of their purpose.

While the question of what constitutes a valid arrest so as to support incidental search in a mixed question of law and fact. see, Diaz v. State, 181 So.2d 351 (Fla.Dist. Ct.App. 1965); Urso v. State, 134 So.2d 810 (Fla.Dist.Ct. App. 1961); and therefore is a question which must be reviewed anew by a federal district court in a habeas corpus proceeding without deference to the state court determination, see, Townsend v. Sain, 372 U.S. 293, 309 n. 6 (1963), the finding by the state courts in this case that there was a reasonable belief on the part of the police officers that Officer Williams was in peril is a finding of fact. See, United States v. Gable, supra. As such, it comes to this court with a presumption of correctness, 28 U.S.C. § 2254(d). It is evidenced in writing by the transcript of the motion to suppress and by the opinion of the Florida District Court of Appeals (189 So.2d 656) and none of the following appear:

> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding," 28 U.S.C. § 2254(d).

Since none of these seven is in issue here the presumption of the correctness of the state court finding stands unless it is not fairly supported by the record, 28 U.S.C. § 2254 (d)(8). An examination of the state court record as a whole leads me to conclude that the state court's finding that there was a reasonable belief on the part of the raiding officers to excuse the complete announcement of both their identity and purpose is not fairly supported by the record.

There is testimony in the transcript of the motion to suppress in the state court that the officers were in a hurry to get inside the clinic to prevent harm to Officer Williams and that she was not, to their knowledge, armed. The officers had previous knowledge that the door to the clinic was held secure from the inside by a steel bar. The petitioner told Policewoman Williams in the presence of

Policewoman Ellison that he was going to give Williams a shot. Officer Ellison came out of the clinic and told the waiting officers that Officer Williams was about to get a needle. When the officers knocked and announced their identity and no one answered, Policewoman Ellison told them to hurry because petitioner was going to give Williams a shot.

The record also reveals that there were no sounds inside the clinic which would lead the officers to think any harm was coming to Policewoman Williams (R. 9). The officers testified that it was part of the plan that if anything went wrong and they could not get into the clinic Officer Williams would not let herself be aborted and would herself place petitioner and others in the building under arrest. Miss Williams was dressed at the time Policewoman Ellison left her to go outside to get the other officers. It is undisputed that the officers knocked and announced their identity and waited between fifteen and thirty seconds before knocking again and breaking down the door. The statement by Policewoman Ellison to the other officers to hurry because petitioner was going to give Williams a shot was made after the initial announcement of identity and immediately before the forcible entry; that is, it was made fifteen to thirty seconds after the initial announcement of identity. Thus, the state court record fairly supports the conclusion only that the officers reasonably believed at the time of the entry that there was an exigency excusing any further announcement. It does not, however, support the conclusion that there was such a belief from the time the officers began knocking on the door to the clinic. They had between fifteen and thirty seconds to complete the announcement by shouting their

purpose as well as their authority. I find the reasoning of United States v. Barrow, 212 F.Supp. 837 (E.D. Pa. 1962) inescapable:

> "[T]here was in fact an announcement of identity. Obviously, if the agents had a bona fide belief that announcement would result in peril, that peril would come from the fact and not the nature of an announcement. The fact that some announcement was made dispels any doubt that the agents had no bona fide apprehension of peril if an announcement were made." Id. at 847.

It was stipulated that only half of the constitutionally required announcement was made. I find that no exigency existed which excused the making of the other half of the announcement. The entry of the officers into the clinic was illegal and the motion to suppress the evidence obtained thereafter should have been granted.

ACCORDINGLY, it is ORDERED and ADJUDGED that the writ of habeas corpus be and the same hereby is GRANTED and that the judgment of conviction be vacated and a new trial granted to the petitioner within a reasonable time or the petitioner set free.

DONE and ORDERED at Miami, Florida, this 6th day of August, 1969.

W. O. MEHRTENS

United States District Court

APPENDIX G

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 69-145-Civ-WM

EFRAIN T. SUAREZ,

Petitioner,

v.

LOUIE L. WAINWRIGHT,
Director of Division of Correction, State of Florida,

Respondent.

ORDER FIXING AND DETERMINING EXPIRATION OF RETRIAL TIME

THIS CAUSE having come on before the Court, upon Petitioner's Motion for Order Determining Expiration of Retrial Time; this Court, by Order Granting Petition for Writ of Habeas Corpus filed August 8, 1969, having vacated the within Petitioner's State Court conviction in the Dade County Criminal Court of Record in Case No. 64-457, 64-3116 and/or 64-3417, with directions to retry the within Petitioner, without the use of certain unlawfully obtained evidence, within a reasonable time or Petitioner would be set free; well beyond six months from said Order having expired and to date there having been no retrial; the entry of the requested Order appearing just and proper,

in order to remove the cloud of apparent pendency of the subject charges against this Petitioner, and the Court being fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that the reasonable period of time provided for in this Court's Order Granting Petition for Writ of Habeas Corpus of August 8, 1969, within which to retry this Petitioner for the subject charges heretofore pending in the Criminal Court of Record in and for Dade County, Florida, has expired.

DONE and ORDERED at Miami, Florida, this 5th day of May, 1970.

/s/ W. O. Mehrtens

Judge, United States District Court

APPENDIX H

EXHIBIT "D"

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

NO. 64-457 (Stedman)

STATE OF FLORIDA,

Plaintiff,

v.

EFRAIN T. SUAREZ,

Defendant.

ORDER DIRECTING RETURN OF PROPERTY SEIZED

THIS CAUSE having come on before the Court upon Defendant's Motion for Return of Illegally Seized Property, the January, 1964 raid which was a predicate for this prosecution having been found to have been illegal in Federal habeas corpus proceedings; the requested relief being appropriately required under the Florida Statutes, case law and practice, and the Court being fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that the State of Florida, its attorneys, investigators, agents, agencies, and representatives, and any parties in privity with any of them, be and they shall forthwith return to the within Defend-

ant, EFRAIN T. SUAREZ, through his counsel of record herein, Stanley Jay Bartel, Esquire, 341 Pan American Bank Building, Miami, Florida, all books, records, papers, documents and other items seized, and any and all copies of the same, excluding only photographs made during or after said raid.

DONE and ORDERED at Miami, Florida, this 22nd day of May, 1970.

CARLING STEDMAN

Judge, Criminal Court of Record

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this May 22, 1970.

J. F. McCRACKEN

Clerk Criminal Court of Record

By: Lyle D. Fuller

D.C.

APPENDIX I

EXHIBIT "E"

Law Offices of

PAUL, LANDY, BEILEY & BARTEL
341 Pan American Bank Building
Miami, Florida 33131

Area Code 305 - 377-0201 - Cable "Paulan"

May 22, 1970

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Glenn Gilson, Esquire
Trial Attorney
Office of the Assistant Regional Counsel
Internal Revenue Service
Room 1220 Federal Building
Miami, Florida

Re: Efrain T. Suarez
Seizure of Alleged Appointment Data
January 2, 1964

Dear Sir:

The undersigned is and has been attorney for Efrain T. Suarez of 2710 Natoma, Miami, Florida for several years in connection with efforts to procure the overturning of a conviction arising out of a search, seizure and arrest of the said Efrain T. Suarez, on or about January 2, 1964,

by agents of the City of Miami Police Department, Sheriff's Deputies of Dade County and Hillsborough County and/or representatives of the State Attorney's office.

After more than six years of continuous litigation, the Defendant, Efrain T. Suarez, was successful in overturning his conviction and in securing an Order Directing the Return of Property Seized during this raid. The premises were at 574 S.W. First Street, Miami, Florida.

Herewith enclosed for background information is a copy of the Federal Court Order Granting Petition for Writ of Habeas Corpus filed August 8, 1969 in the case styled Efrain T. Suarez v. Louie L. Wainwright, Director of Division of Corrections, State of Florida, No. 69-145-Civ-WM. Subsequent thereto, our office, on behalf of Dr. Suarez, moved for entry of a pro forma order — as a corrolary to the Order suppressing the evidence illegally seized — for the return of the actual personal property taken in the subject raid. The Federal Court, while it indicated it had power and jurisdiction as well as the inclination to grant the requested relief, suggested that the application for same be made to the State Court, wherein he was convicted. A carbon copy of the Federal Court Order to this effect, filed May 4, 1970, is also enclosed for your background information.

In accordance with the Federal Judge's suggestion, our office moved promptly before the State Criminal Judge for the return of personal property, as is required under State law. See Fla. Stat. Sec. 933.14. On this day, the Honorable Carling Stedman entered his Order Directing the return of all property seized, as reflected in the certified copy of same herewith enclosed.

Promptly after this hearing, the undersigned communicated with representatives of the various State agencies involved and learned that shortly after the January 2, 1964 raid, a copy of alleged appointment data was requested by and given to agents of the United States Internal Revenue Service. Further communication this day with Dr. Suarez has led us to communicate with his tax counsel, Greenberg, Traurig & Hoffman, who have advised us that at this very moment, United States Department of Justice or agents of the Internal Revenue Service are planning to use these illegally seized documents in a forthcoming Tax Court case against Dr. Suarez, which we understand to be scheduled for June 8, 1970. If you will carefully review the terms of the State Court Order Directing the Return of Illegally Seized Property, herewith enclosed, you will see that the Federal authorities, being in privy with the State agents conducting the raid, are required to return all illegally seized items, along with all copies of same. In connection with the latter aspect, I cite you to the decision of Goodman v. U.S., 369 F.2d 156 (9th Cir. 1966), which treats copies of illegally seized documents in the category of originals.

This letter will constitute a formal demand upon you and all members of your office and staff to forthwith (in the words of the enclosed Order) return to Efrain T. Suarez, through the undersigned, all originals and copies of all documents seized in the January 1964 raid. A self-addressed stamped envelope is enclosed to enable your immediate compliance.

If there is one among you or the named addressees set out in the attached list who can authoritatively state how

many originals or copies of seized Exhibits are in the possession of Federal authorities, we should like that assurance.

I must assume that in their preparation for the trial before the Tax Court, the various representatives of the United States that have been involved were not aware of the results of the Federal habeas corpus action. Now, however, you are formally made aware of the results in both State and Federal Court and demand is herewith formally made upon you and each of you to forthwith desist from further invasion of Dr. Suarez's constitutional rights by continued retention of any originals or copies of these illegally seized documents.

I will await your compliance, not later than by May 27, 1970.

Very truly yours,

STANLEY JAY BARTEL

Stanley Jay Bartel

SJB:jy
Enclosures

(See attached list for additional addresses)

Additional Addresses

1) Assistant Regional Counsel
In charge of Miami Branch Office,
Regional Counsel's Office
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

2) Assistant Chief — In charge of
Miami Branch Office
Appellate Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

3) Assistant Chief — In charge of
Miami Branch Office
Intelligence Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

4) Homer C. Cline, Special Agent
Intelligence Division
Internal Revenue Service
Federal Building — 51 S.W. 1st Avenue
Miami, Florida

5) Greenberg, Traurig, Hoffman & Lipoff
Attorneys-at-Law
Northeast Airlines Building
150 S.E. Second Avenue
Miami, Florida

APPENDIX J

[TITLE OMITTED]

ORDER TO SHOW CAUSE

THIS CAUSE having come on before the Court on sworn Motion, and the Court having considered same, and the record of this cause, and being fully advised in the premises, it is thereupon:

ORDERED and ADJUDGED that:

1. The Commissioner of Internal Revenue Service, through each and every local agent, representative and attorney responsible, at the local level, for the custody or use in Tax Court Case, Docket No. 4169-67 of any evidence, or copies thereof, originally seized by State and/or Municipal Officials in the raid on the Ayala Clinic, 574 S.W. First Street, Miami, Florida, conducted on or about January 3, 1964, be and they are each hereby ordered and directed to personally appear before this Court at 9:30 o'clock A.M. on the 10th day of June, 1970, to show cause, if any there be, why they should not be adjudged in contempt of this Court's Order Directing the Return of Property Seized of May 22, 1970, a true copy of which is attached hereto as Exhibit "A", and be dealt with appropriately, to include potential assessment of attorneys' fees, for:

(a) Willful, knowing and obstinate refusal to turn over to counsel of record for the Defendant herein, after due demand, all the evidence and/or copies thereof

described above, which they, as privies of the State and/or Municipal agents, held as of the date of demand and apparently still hold; and

(b) Issuance of a subpoena duces tecum, a true copy of which is hereto attached as Exhibit "B", openly defying the carrying out and intent of this Court's Order of May 22, 1970, restoring full possession, with constitutional immunity, of all illegally seized materials to this Defendant.

2. Certified copies of this Order shall be served, forthwith, by the Sheriff of Dade County, upon the following local Federal Agents:

Glenn Gilson
Trial Attorney
Office of the Assistant Regional Counsel
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Roger T. Cable
Internal Revenue Officer
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Homer C. Cline
Special Agent, Intelligence Division
Miami Branch of the Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

Robert W. Rust
United States Attorney for the
Southern District of Florida
Main Post Office Building
300 N.E. First Avenue
Miami, Florida

Head of Intelligence Division
Miami Branch Office of the
Internal Revenue Service
Federal Building
51 S.W. First Avenue
Miami, Florida

A. V. Wootten, Assistant Chief
Appellate Division
Internal Revenue Service, Miami Branch Office
Federal Building
51 S.W. First Avenue
Miami, Florida

Dennis Fox
Assistant Regional Counsel
Miami Branch Office of the
Internal Revenue Service
Federal Building
Room 1220, 51 S.W. First Avenue
Miami, Florida

3. Certified copies shall be mailed, certified mail, return receipt requested, to the following regional and national Federal agents:

Randolph W. Thrower
Commissioner of Internal Revenue
Department of Treasury
15th and Pennsylvania Avenue, N.W.
Washington, D.C.

John N. Mitchell
Attorney General of the United States
Department of Justice
Constitution Avenue and 10th Street, N.W.
Washington, D.C.

Andrew J. O'Donnell, Jr.
District Director of Internal Revenue
Internal Revenue Service
400 West Bay Street
Jacksonville, Florida

Dick Elliott
Chief of Intelligence Division
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

Louis M. Tigh
Chief of Appellate Division
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

Henry C. Stockell, Jr.
Regional Counsel
Internal Revenue Service
275 Peachtree Street, N.E.
Atlanta, Georgia

4. The Clerk of this Court shall provide, without charge, all necessary certified copies required to effect the foregoing service.

DONE and ORDERED at Miami, Florida, this 5th day of June, 1970.

CARLING STEDMAN
Judge, Criminal Court of Record

I hereby certify that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this June 5, 1970.

J. F. McCRACKEN
Clerk Criminal Court of Record

By: CHARLES C. PAGE
D.C.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 70-821-Civ-CF

STATE OF FLORIDA,
Plaintiff,

vs.

EFRAIN T. SUAREZ,
Defendant.

ORDER

Petitioner, the Commissioner of Internal Revenue Service by the United States Attorney for the Southern District of Florida, having filed a Petition for Removal of the case of STATE OF FLORIDA, Plaintiff vs. EFRAIN T. SUAREZ, Defendant, No. 64-457 (Stedman), in the Criminal Court of R Record in and for Dade County, Florida, pursuant to Section 1442, Title 28, United States Code, and the Court being fully advised in the premises, is of the opinion that the Petition should be granted; it is therefore

ORDERED and ADJUDGED that the case of STATE OF FLORIDA, Plaintiff, vs. EFRAIN T. SUAREZ, Defendant, No. 64-457 (Stedman), in the Criminal Court of Record in and for Dade County, Florida, be removed to the United States District Court for the Southern District of

Florida, and that all further proceedings in the Criminal Court of Record in and for Dade County, Florida, be stayed.

DONE AND ORDERED at Miami, Florida, this 9th day of June, 1970.

/s/ W. O. Mehrtens

United States District Judge

APPENDIX L

42 § 1985 PUBLIC HEALTH & WELFARE Ch. 21

SUBCHAPTER 1.—GENERALLY—Continued

§ 1985. Conspiracy to interfere with civil rights — Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons con-

spire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.